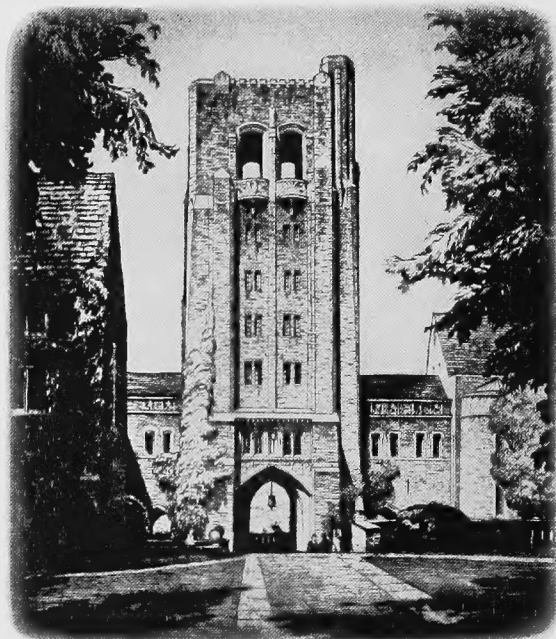


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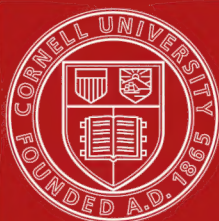
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RULES OF EVIDENCE

AS

PRESCRIBED BY THE COMMON LAW

FOR THE

TRIAL OF ACTIONS AND PROCEEDINGS

BY

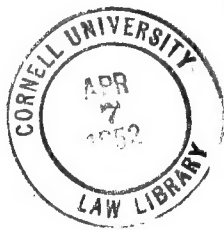
GEORGE W. BRADNER

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INTRODUCTION.

When a new work is offered to the public, and especially when there are several existing works upon the subject, it is expected that the author will state the reasons which induced the publication. One of the important features of this work is that it will be a work for lawyer and student. The searcher for a rule of evidence can find what he wants without trouble, and the lawyer who desires a case illustrating a rule will find it useful, collecting as it does the latest cases.

The work will present several useful innovations. The rules of evidence, together with the reasons for the same, are treated rather more fully than in such excellent works as "The Theory of Evidence," by Reynolds, and Stephen's "Digest of the Law of Evidence."

The latest cases are not to be found in the larger and older works. As one of the older works — Greenleaf, Best, Taylor, or Wharton — is generally to be found in the hands of every practitioner, and accessible to every student, a mere reproduction of their works even in new form is unnecessary. The author has therefore made use of the arrangement of Stephen, modified as he thought necessary, enlarged by a fuller statement of the rules, having made a point of citing only such of the older cases generally cited in the older works as were necessary or advisable, and having taken especial pains to cite the late cases through the union illustrating the application of the rules of evidence. This feature of the work makes it especially desirable to the trial lawyer, and enables him at a very moderate price to supplement these older works by the latest utterances upon the subject, arranged in accordance with the most logical order of which the subject admits.

The student will discover a considerable advantage over any other work, finding in a moderate compass a full discourse of the law of evidence with the benefit of the latest cases. The

law is changing. Time was when the earliest precedent was of paramount authority, and later decisions were tested by the earlier, and disregarded when not following the earlier. But this rule has been reversed. It is now the latest decisions of the courts of last resort which are regarded as the highest evidence of the law. The rules of exclusion of overruled and obsolete decisions and cumulative citations in law-book making are hardly less important than those of inclusion, and on this point the student and practitioner will find this work of value. The general rule is first given, the illustrations immediately follow the rule, and the exceptions in the order of their frequency. We have attempted in many cases to make the general rules condensed treatises, full of valuable information. The work is a compromise between the works of Greenleaf, Taylor, Phillips and Roscoe, on the one side, and those of Abbott and Stephen on the other. We have attempted to make the rules lucid and terse, conveying, as is the function of a law-book of the present day, the information which they contain at a glance.

We have attempted another point of great importance to the practitioner in the grouping of subordinate rules around the general rules. This plan saves space and time. It is of immense service to the practitioner to have what the courts have held to be the law, grouped where it can be read immediately. We claim this to be a new service which this work lends to the profession. The thousands of illustrations in the context present the latest knowledge on the subjects they are designed to explain. It is true that there are numerous works, American and English, which in the aggregate treat the subjects included in this work; but most of them cover the same ground as the others, so they are practically duplicates. Most of them are several years behind the decisions of the courts. In some of these works the law of evidence seems to be regarded as a distinct body of rules, independent of the other members of the body of the law, and the efforts of the writers seem to have been limited to an exposition of those views. This view is proper enough in one aspect, but it is nevertheless a very limited view of that branch of the law. It is to be recollected that the English law of evidence had its origin in the English courts, and is perhaps the most perfect

example we possess of what is known as judge-made law. It is substantially the creation of successive generations of judges in the courts of common law. It grew up as a thing of custom and practice. It was made by judges for juries, and this fact no doubt serves to explain many of its peculiarities. They were founded largely on distrust of the capacity of the tribunal to which the issues of fact belong. It may be conjectured that if trial by jury had not been the practice of the common law — if the judges had acquired the power of deciding issues of fact as well as of law, — many of the most obnoxious rules of evidence would never have existed. The legislature has interfered mainly for the putting an end to the exclusion of certain classes of witnesses. Certainly the most important of the statutes dealing with the law of evidence are those which make classes of persons, formerly excluded, competent to testify.

Our text-books on the law of evidence owe their enormous bulk to the introduction of rules which properly belong to the substantive law, or to the rules of pleading and practice. But this is necessary from the fact that the law of evidence is not a distinct body of rules independent of the other members of the body of the law; that is, the substantive law and law of procedure are but different members of one harmonious body. Neither can have any proper force or vigor without the other; thus, substantive law establishes rights, and the law of procedure points out how remedies are obtained for infringement of them. It is substantive law which declares that a person shall enjoy security of person and property, and defines the nature of these personal and property rights and declares him a wrong-doer who infringes them. The law of procedure directs and controls the manner of administering law for the protection of rights and provides remedies for injuries in courts of law. The law of procedure is made up of pleadings, practice and evidence. The subject of pleadings relates to the orderly presentation upon the record of the contention of the respective parties in relation to the subject-matter of the controversy. Practice is that branch of procedure which points out in what manner the various steps are to be taken; not what steps are to be taken, but how they are to be taken. Pleadings and evidence are very closely associated, and it is hard to draw the line between them. It is necessary to dis-

tinguish two common meanings of the word "evidence" which are not unfrequently confused. Evidence sometimes means the ascertained facts from which we infer the existence of some other fact or principle. It also means the testimony of persons as to the existence of facts, from which testimony we infer that these or other facts do or do not exist. It is the latter sense alone which is appropriate in speaking of judicial evidence. The word "evidence" includes all the legal means which tend to prove or disprove a fact; and the law of evidence in the broadest sense in which it is used, as the designation of a department of the law of procedure, embraces not only what matters may be legally submitted to a tribunal empowered by law to decide an issue of fact, but the manner in which, and the means by which, and the party by whom, those facts may and must be shown. The rules of the law of evidence are based chiefly on considerations relating to human testimony. Their fundamental purpose is to guard and test the truthfulness of statements as to matters of fact made in a court of justice. The farther question, what conclusion is to be drawn from the facts supposing them to be true, is the subject of few if any specific rules. Rules of evidence play an important part in the administration of justice. They should be reasonably and consistently enforced so as to give certainty to the law which protects the rights of parties. The law of evidence determines what facts are deemed to be of sufficient probative force to be heard as tending to establish the legal facts in issue, and also the means by which those facts may and must be made apparent. The first part of the definition is called relevancy; the second is called proof. The general theory of relevancy excludes testimony relating to facts from which no conclusion whatever could be drawn with reference to the facts in issue. On the other hand, in the case of what is called "conclusive proof," the law directs that on certain evidence the judge must regard some fact as proved, and reject any evidence offered against it. Between these two extremes, the law leaves the relation between facts in evidence and facts in issue to the unaided logic or common sense of the tribunal.

The theory of relevancy, above alluded to, lies at the root of the law of evidence, and requires some preliminary explana-

tion. The phrase is not one of common use in our text-books, and nothing like a statement of the general principles is to be found in them. Roscoe, for instance, simply states that "as the object of pleading is to reduce matters in difference between the parties to distinct and simple issues, so the rules of evidence require that no proof, oral or documentary, shall be received that is not referable to those issues. All evidence of matters which the courts judicially notice, or of matters immaterial, superfluous or irrelevant, is therefore excluded." And again, "In general, evidence of collateral facts not pertinent to the issue is not admissible." We are left to collect from the decided cases what things are relevant and material; and what things are irrelevant and superfluous. It will be noticed that, unlike the rules of pleading, the rules of evidence cannot always be based upon logical reasons; they are based upon such reasons as are deemed good and sufficient; that is, many of them depend entirely upon the notion of the legislature or the influence upon the court of what is termed the policy of the law.

As to relevancy, there is a distinction between logical relevancy and legal relevancy; as, for illustration, in the trial of one accused of crime, the admission or confession of a third person that he committed the crime is logically very convincing, and in fact is relevant; that is, it relates to the crime charged and the person who committed it, but it is not ordinarily considered relevant in law. As before stated, there is a point on the question of relevancy where it depends entirely upon the discretion of the judge, namely: in cases where the question is a close one, as to whether certain facts are too remote, although connected with the fact in issue. Upon such questions no exact rule can be formulated. The distinction sometimes drawn between direct and circumstantial evidence is of popular rather than of legal interest. The fact in issue may be proved either by the testimony of persons who swear to it as a matter of personal knowledge, or by the testimony of persons who swear to other facts from which the existence of the fact in issue is inferred. In the former case the evidence is said to be direct, in the latter circumstantial. The probative force of these two sorts of evidence has been differently estimated. On the one hand, it has been said — and

this we would think is the more popular view — that a conclusion arrived at merely from inference is not so trustworthy as the positive assertion of a sane and honest witness who testifies to what he has actually seen or heard. The explanation would seem to be that men have less confidence in their own powers of reasoning than in the assertions of others. It is hardly necessary to point out that in both cases a process of inference is necessary: that we infer the existence of the fact from the fact that the witness swears to it, and that this inference, like others, is exposed to the chance of error. On the other hand, the numberless instances in which positive, direct testimony as to matters of fact has been subsequently shown to be entirely false or erroneous has led to the opposite opinion, that circumstantial is more trustworthy than direct evidence. The general rule is that evidence may be given in an action or proceeding of the existence or non-existence of any fact in issue, and of any fact relevant to any fact in issue, and of no others. Relevant facts here means simply facts — other than those in issue — which may be proved, and would include cases of relevancy strictly so called — *i. e.*, facts relevant in the sense that from their existence you may infer the existence of the facts in issue. There are minor classes of facts, not being facts in issue, and not being relevant facts in this sense, which nevertheless may be proved. For example, “facts which, though not in issue, are so connected with facts in issue as to form part of the same transaction,” and “facts which are necessary to be known to explain or introduce a fact in issue,” may be proved; but to say that they are relevant tends to obscure the theory of relevancy. What facts, then, are to be regarded as relevant to facts in issue? Our law, as we have seen, makes no attempt to answer this question otherwise than by the enumeration of decided cases. Sir J. Stephen, in his very useful digest, borrows the general definition of relevancy from a pamphlet on the theory of relevancy for purposes of judicial evidence, by George C. Clifford Whitworth, Bombay, 1875, which is stated as follows: “Facts, whether in issue or not, are relevant to each other when one is, or probably may be, or probably may have been, the cause of the other, the effect of the other, the effect of the same cause, the cause of the same effect,— or when the

one shows that the other must or cannot have occurred, or probably does or did not exist, or that any fact does or did exist or not, which in common course of events would either have caused or have been caused by the other." There is little doubt that this is a correct statement of the general principle embodied in the decided cases. Facts may be proved from which legitimate inferences may be drawn as to the existence of the facts disputed at the trial, and this inference depends on the existence of a casual connection between the two sets of facts. It is perhaps hardly necessary to give instances in illustration of the general definition of things relevant. The conduct of a person charged with an offense is one of the most common and the most obvious cases. Thus, "any fact which supplies a motive for such an act, or which constitutes preparation for it, any subsequent conduct of such person which appears to have been influenced by any such act, and any act done in consequence of any such act by or by the authority of that person," may lead to inferences as to the act itself.

The limit of relevancy is sometimes expressed by saying that collateral facts are not admissible in evidence unless pertinent to the issue; but, as usual, we are left to collect the meaning of "collateral" from the decided cases. The typical case is perhaps that of *Holcombe v. Hewson*,¹ where, on a question whether the beer supplied by plaintiff to defendant was good, the plaintiff was not allowed to prove that the beer he supplied to his other customers was good. All proof of facts which merely tends to create an unjust prejudice, or unduly to influence the jury, or occupy the time of the court in irrelevant inquiries, is inadmissible; but if the proof be directly or indirectly pertinent to the issue, it will be admitted, which seems to come to this: that mere similarity in circumstances or coincidence in time will not make one fact relevant to another, unless some casual connection between them is made apparent. Thus, in the beer case above mentioned, the evidence might have been made relevant by showing that the beer supplied to all the customers was the same. The exceptions to the rule excluding collateral evidence will be found to be cases that have been brought within the general rule of

¹ 2 Campbell, 391.

relevancy. Some bond of connection, as cause and effect, will be found to have been established between them. Thus, when the intention of an act is in question,—as in the case of a man accused of setting fire to his house in order to get insurance money,—other instances of similar acts, as that the prisoner had previously had two houses burned, each being insured, and the insurance money having been paid, may be adduced.

Another instance of departure from the logical theory of relevancy is the evidence of opinion. The broad rule, to which the ancient law scarcely knew an exception, is that testimony can relate merely to facts, and that the inferences from them are to be made by the jury. But this general rule has been broken in upon by the admission of various classes of exceptions, all resting on the common ground of necessity. While the general rule is that the fact that any person is of opinion that a fact in issue or relevant to the issue does or does not exist is not regarded as relevant to the existence of such fact, a distinction must be drawn between the two senses in which the word “opinion” may be used. In common parlance the belief of a scientific witness on some technical point, and the belief of an ordinary witness as to some fact perceived by himself, would with equal propriety be described as opinion. The opinion in each case is the result of a process of reasoning. In each case one reasons from a number of facts to a conclusion. The belief of a person in a question of personal identity is based on a number of facts as to which he has no doubt—*e. g.*, the size, the build, the gait, the clothes of the person in question. The law, however, draws a broad distinction between this kind of inference and the open and deliberate inference as to matters not directly perceived by the senses. It distinguishes between facts and inferences, holding, in disregard of psychology, that the former are directly perceived; but it does not insist upon absolute certainty in the perception. A witness may “believe,” or “think,” or “be of opinion,” that he saw A. on a certain day, or he may say positively that he did see him. The strength of his persuasion will be considered by the tribunal, but his evidence will not be rejected because his persuasion is weak. By opinion, then, is meant not merely a lower degree of per-

suasion, a more feeble belief, but a belief held as the result of inference and not of direct perception. There is nothing in the feebleness with which a witness' belief in the existence of a fact is expressed or held to make it irrelevant. But as a general rule, opinion in the other sense is not admissible in evidence at all. It is the business of the tribunal, of the jury, to form such opinion for themselves. Indeed, the exclusion of opinion in evidence is put on this very ground in some of the decided cases. But the general rule has its exceptions, which may almost all be included "in the opinion of experts." In matters of science and skill requiring special study and education, the opinions of persons so qualified — experts — may be given in evidence. But an expert cannot give an opinion as to the existence of the facts on which his opinion is based, although of course he may testify to them if he has perceived them himself.

The effect of a presumption — *presumptio facti*, as distinguished from *presumptio juris*, or conclusive proof — is to throw the burden of proof on the party who denies it as a matter of fact. Writers on the law of evidence generally distinguish between presumptions of law and presumptions of fact — the latter being, the former not being, rebuttable by counter-evidence. Presumptions of law are, in reality, rules of law and part of the law itself, and the court may draw the inference whenever the requisite facts are developed. Some regard it as falling properly under specific divisions of the substantive law. Presumptions of this sort are an indirect way of expressing some legal principle. Presumptions of fact, *i. e.*, conclusions which on certain evidence must be adopted by the court until and unless they are disproved by counter-evidence, are cases in which the task of inference is taken out of the hands of the jury altogether. Besides these two classes of presumptions, and along with them, there are presumptions, *i. e.*, inferences from facts, within the province of the jury itself. These are neither more nor less than various degrees of probability in cases of circumstantial evidence. The distinctions made by the leading text-books of violent, probable, light or rash are of no value. Presumptive evidence, and the presumptions of proofs to which it gives rise, are not indebted for their probative force to any rules of positive

law; but juries, in inferring one fact from others which have been established, do nothing more than apply, under the sanction of the law, a process of reasoning, the force of which rests on experience and observation, and such inferences are presumptions of fact. The effect of presumptions may be compared with that of estoppel. The former establishes against a party a conclusion which stands unless and until he positively disproves it. By estoppel a party is prevented from disproving a fact which he has actually or constructively asserted.

Certain classes of facts are protected from disclosure on various grounds. Thus, no person can be compelled to disclose communications made to him by his wife during marriage, and servants of the state cannot be compelled to give evidence of official matters without the consent of the head of the department to which they belong. But perhaps the most important case is that of communications between lawyer and client. The lawyer is not allowed to disclose any communications without the client's consent, nor can the client be compelled to disclose such communications himself. The rule, however, will not extend to communications in furtherance of any crime or fraud.

In attempting to give an outline of the law of evidence, we start with the fundamental principle that the great object in judicial evidence is the discovery of truth. Any attempt to impose a particular logical theory upon the judges or the legal profession would be sheer nonsense; and we doubt whether any branch of the law is so difficult to arrange in a complete and satisfactory manner.

The principles of evidence cannot be embodied in rigid and lifeless formulas which deny adaptation to new conditions in human affairs. They admit of expansion and of frequent exception whenever it is needed in order to demonstrate the truth. A different view of the law of evidence might be extremely subversive of justice. The law of evidence as a system is based both upon principles and upon rules which, when not prescribed in statutes, arise out of precedents in decided cases. The rule is an exposition of the principle, but it is based upon judicial experience in the investigation of controversies by means of testimony, and is necessarily influenced by what may

be the existing condition of things. It is well, though somewhat elementary, to observe that in the application of the principles of the law of evidence to the investigation of the truth in a controversy over an alleged matter of fact, the aim is to confine the proof only within the bounds of what is competent and satisfactory evidence, and that by competent evidence is meant such as the nature of the thing to be proved requires, and that by satisfactory evidence is meant such as shall suffice to satisfy the unprejudiced mind. If some rule of evidence is alleged to militate against the competency of the species of proof offered, I suppose it should comply with two conditions to satisfy the mind as to its force. It should appear that it was established upon a sufficient precedent fitting the case, and that the nature of the thing to be proved did not require any exception to, or modification of, the supposed rule.

Mere number of citations of cases is not the only or the chief test of value in a law-book, and the author has in this work carefully ruled out those that are clearly obsolete. A special feature is the "running in" of questions of minor importance, whereby a great saving of space is made. In order to add to the utility of this work, we have used the familiar but always serviceable device of placing the contents at the head of each chapter, subdividing the context, and giving the text at the head of each subdivision.

We follow in the main the divisions adopted by Roscoe and other elementary writers, viz.: 1st. What facts may be proved in a court of law; 2d. By what kind of evidence they must be proved; and 3d. By whom, and in what manner, the evidence must be produced. We have not attempted to follow out the matters into their minute ramifications. We think, however, that any one who makes himself thoroughly acquainted with the contents of this work will know fully and accurately all the leading principles and rules of evidence which occur in actual practice. We find every text-writer striving to draw the line between the theory on which the rules of evidence depend, and the rules of evidence themselves. This they have found to be a difficult undertaking. It has been suggested, with great plausibility, that the simplest way of stating the law of evidence would be to omit all reference to the relevancy of facts, and to lay down a series of rules as to the

classes of facts of which proof is or is not admissible. It has also been said that such a way of treating the subject is more convenient for the practitioner than any arrangement yet adopted, as the law, as distinguished from the theory of judicial evidence, is the work of many generations of judges, who have worked it out.

Every person who attempts to state the rules of evidence without a rigid theory as to the value of pleadings and practice, allowing himself to be guided entirely by the decided cases, will be led into a labyrinth of indeterminable contradictions; and I defy any person to compose a consistent work on practice evidence if he follows all the decided cases. It is hardly necessary to say that with such difficulties, in order to give only what is incontestable, we must limit ourselves to general lines.

The plan followed in this work has prevented the introduction of long critical dissertations on controverted points. A continuous system of citations gives the reader the means of verifying by their sources all the propositions of the text. In these citations I have strictly confined myself to the leading cases,—I mean to the latest cases in the courts of last resort. I know that to persons little acquainted with the law of evidence many other developments would have been useful, but I am unaccustomed to doing over again what has been done and well done. Abbott, Lawson, Roscoe, Taylor, Rice, Wood and others are now in the hands of most practitioners. Those, I say, who will consult these excellent works, will find in them the explanation of a multitude of points upon which I have been compelled to be very succinct. I believe that I have neglected, among modern authorities, no source of information. Thanks to the thorough studies of which these questions have been the subject for centuries, a problem that would formerly have been deemed impossible has reached a solution which leaves room for much uncertainty, but which is amply sufficient for the demands of the practitioner. It is of small importance to our present object to carry this delicate analysis farther, and to endeavor to reconstruct in some manner, on the one hand, the theory, on the other the practice, of the great subject. When I for the first time conceived a work on evidence, what I wished to write was in fact the

rules, in which decided cases would have had scarcely any part. But I have learned since that a rule of evidence is not a mere play of abstraction; that in it pleadings, procedure and the discretion of the judge make up the major part.

All we propose to do is to collate the work of the judges and put it into a concise form for the use of the profession.

GEO. W. BRADNER.

November 10, 1894.

B

TABLE OF CONTENTS.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

	<i>Page.</i>
EVIDENCE — DEFINITION OF	1
§ 1. In general	1
2. Primary	2
3. Secondary	2
4. Positive	2
5. Presumptive	2
6. Hearsay	2
7. Parol	2
8. Circumstantial	2
9. Conclusive	3
10. Direct	3
11. Extrinsic	3
12. Cumulative	3
13. Competent	3
14. Relevant	3
15. Moral	3
16. Satisfactory	4

CHAPTER II.

RELEVANCY AND MATERIALITY.

§ 1. Relevancy — Meaning of	5
2. Illustrations	6
3. Evidence must be within the issue	8
4. Must tend to prove issue when	10
5. As against one of two or more defendants	11
6. Proof of negative	11
7. Matters pending suit	11
8. Intentions, good faith, etc.	12
9. Illustrations	12
10. Notice, knowledge, etc.	14
CHARACTER AND REPUTATION	15
§ 11. In general	15
12. In criminal cases	15
13. Impeaching evidence	17
14. Number of witnesses	17
15. Proof of corroborating declarations	18

	<i>Page.</i>
§ 16. Sustaining evidence	18
17. Party calling a witness may show his contradictory statements	19
18. Cross-examination as to collateral facts	20
19. Laying foundation for contradicting witness	21
20. When reputation is in issue	22
21. Mode of proving reputation in other cases	22

CHAPTER III.

EVIDENCE UNDER PARTICULAR PLEADINGS.

IN GENERAL	24
§ 1. Custom	25
2. Title in a stranger	25
3. Failure to deny — Effect of	25
4. Promise to pay note after dishonor — Proof of protest	26
5. Under plea of a statute	26
6. Defense	27
7. <i>Res adjudicata</i>	27
8. Limitations	28
9. Discharge from debts	28
10. Release	28
11. Matter of inducement — Libel and slander	28
12. Special damage	28
13. Trespass	29
14. Negligence	29
15. Composition — Payment — Infancy, etc.	29
16. Illegality	30
17. Performance	30
18. Warranty of title	30
19. Ownership	30
20. General denial — Value	31
21. Fraud	31
22. Contract with common carriers	31
23. Actions on judgments	32
24. Eviction	32
25. Negotiable paper	33
26. Work and materials	33
27. Sale of personal property	35
28. Money had and received	37
29. Actions against receivers, etc.	38
30. Partnership actions	38
31. Public officers	39
32. Married women	39
33. Heirs and next of kin	40
34. Admission in pleading	40
35. Attacking an instrument set up as a counter-claim	41
36. Proof of defenses arising after suit brought	42
37. Explaining inconsistencies between testimony and pleading	42

CHAPTER IV.

EVIDENCE EXCLUDED FROM PUBLIC POLICY.

	<i>Page.</i>
I. PRIVILEGE OF WITNESSES	43
§ 1. In general	43
2. Criminating answers	44
3. Cross-examination of a defendant when he offers himself as a witness in a criminal case	45
4. Questions tending to degrade a witness	48
5. Judges	49
II. BETWEEN COUNSEL AND CLIENT	49
§ 6. In general	49
7. What communications come within the rule	50
8. Extent of the protection	50
9. Opinion of counsel protected when	51
10. Documents and papers protected	52
11. When the attorney is also a party	52
12. Protection perpetual when	53
13. What communications are not privileged	53
III. PHYSICIANS AND PATIENTS	55
§ 14. In general	55
15. When physician prohibited from testifying	57
16. Waiver by patients	58
17. Clergyman	59
IV. STATE SECRETS	60
§ 18. In general	60
19. State officials	60
20. Grand jurors	60
V. HUSBAND AND WIFE	61
§ 21. In general	61
22. Marriage—Proof of, necessary	62
23. Illustrations	62
24. Personal privileges	63
25. Offer to settle or compromise	64

CHAPTER V.

COMPETENCY OF WITNESSES.

§ 1. In general	66
2. Religious belief	67
3. Illustrations	68
4. Infants	69
5. Illustrations	70
6. Idiots and lunatics	71
7. Illustrations	72
8. Persons convicted of crime	72
9. How incompetency removed	73
10. Husband and wife	73
11. Extent of the rule	75
12. When relation begins and terminates	75
13. Exception to rule of exclusion in criminal cases	76

	<i>Page.</i>
EFFECT OF DEATH OR DISABILITY OF OTHER PERSONS	76
§ 14. In general	76
15. Interested third persons	79
16. Assignors, grantors, etc., of parties as witnesses	80
17. Heirs, legatees, distributees, etc., as witnesses	80
18. Agents and representatives as witnesses	80
19. Effect of prior evidence on other side	81
20. What is not a personal transaction	81
21. Illustrations	84

CHAPTER VI.

JUDICIAL NOTICE.

I. OF WHAT MATTERS COURTS WILL TAKE JUDICIAL NOTICE	87
§ 1. In general	87
2. Public acts — What are	88
3. Common experience	89
4. Charters, private statutes, etc.	90
5. Law of nations	91
6. Matters taken notice of	91
7. Matters not taken notice of	96
8. Official character, acts, duties, etc.	96
9. Political divisions and geographical matters	97
10. Statutes of other states	99
11. Statutes as ground of action or defense	100
II. RAILROADS	101

CHAPTER VII.

ADMISSIONS AND CONFESSIONS.

ADMISSIONS	103
§ 1. In general	103
2. Illustrations	104
3. Implied admissions	105
4. Illustrations	107
5. Agents	109
6. Principal and surety	110
7. Admission of former owner of chose in action	111
8. Sheriff — Action for not executing process, etc.	111
9. Attorney and counsel	112
10. Person referred to by party	112
11. Partners and joint contractors	112
12. Administrators, executors, trustees, etc.— Admissions by	113
13. Confessions	114
14. Illustrations	115
15. In one's own favor	117
16. Whole admissions must be taken together	118

CHAPTER VIII.

BEST AND SECONDARY EVIDENCE.

	<i>Page.</i>
I. OF BEST AND SECONDARY EVIDENCE	119
§ 1. In general	119
2. Primary evidence and rules for proving	120
3. What instruments must be produced	122
4. Admissions of party in place of writing	123
II. PUBLIC DOCUMENTS	123
§ 5. In general	123
6. Examined copies	124
7. General records of the nation	124
8. Exemplifications	124
9. Copies equivalent to exemplifications	124
10. Certified copies	124
11. Legislative acts of states and territories	125
12. Records and judicial proceedings of state courts, etc.	125
13. Public records of state, etc., not judicial	126
14. Foreign acts of state, judgments, etc.	126
15. Secondary evidence — What is	127
16. Secondary evidence admissible when	127
17. When writing need not be produced or accounted for	129
18. Sufficiency of search, etc.	130
19. Notice to produce documents, necessary when	131
20. Notice to produce — Sufficiency of	133
21. Effect of notice	133
22. Secondary evidence — How proved	134
23. Sufficiency of secondary evidence	135
24. Memoranda	137
25. Oral proof of contents of deposition	137
26. Demonstrative evidence	138
27. Physical examination	139
28. Photographs, etc.	140

CHAPTER IX.

PAROL EVIDENCE CONCERNING WRITINGS.

I. PAROL EVIDENCE CONCERNING WRITINGS	142
§ 1. In general	142
2. Contemporaneous parol contract — Presumptions as to	144
II. SEALED INSTRUMENTS	147
§ 3. Actions at law	147
4. Equity actions	147
III. EVIDENCE FOR THE INTERPRETATION OF DOCUMENTS	148
§ 5. In general	148
6. Illustrations	149
IV. TIME OF PERFORMANCE	150

	<i>Page.</i>
V. TO IDENTIFY A SUBJECT OR PERSON	151
VI. TO SHOW INTENTION OF PARTIES	153
§ 7. Illustrations	154
VII. TECHNICAL TERMS EXPLAINED BY PAROL	156
§ 8. Forms of expression	158
VIII. LATENT AMBIGUITIES	158
§ 9. In construction of will	159
IX. PATENT AMBIGUITIES	160
X. CUSTOM AND USAGE	161
§ 10. In general	161
11. Illustrations	162
12. Qualities of	166
13. When not necessarily general	167
14. How established	167
XI. LOCAL USAGE—NOTICE OF MUST BE SHOWN	168
XII. WHEN CUSTOM NOT VALID	171
XIII. MEANING OF WORDS INTERPRETED BY USAGE	171
XIV. ADDING INCIDENT TO CONTRACT	172

CHAPTER X.

EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

PAROL EVIDENCE CONCERNING WRITINGS	174
§ 1. Writings not signed by both parties	174
2. As to the existence, identity or validity of contract	175
3. To show that writing purporting to be a contract was not intended as such	176
4. Surrounding circumstances	176
5. When consideration of written contract may be shown to be different	179
6. Receipt, etc.	181
7. Parol evidence to complete an entire agreement of which a writing is only a part	182
8. Illustrations	187
9. As to bills and notes	188
10. To show that writing apparently absolute is not	190
11. Statutes of fraud — Admissibility of parol evidence	190
12. Bills of lading	191
13. Subsequent changes of contract	192
14. Bills of sale — Parol evidence to vary	192
15. Written assignments — Parol evidence as to	193
16. True part and character of party	194
17. Written leases — Parol evidence as to	194
18. Collateral contract by parol	195
19. Illustrations	198
20. To show a deed to be a mortgage	200
21. Conditions upon which a writing was delivered	201

	<i>Page.</i>
§ 22. Illustrations	203
23. Immovables, inscriptions, etc.	205
24. Warranty	206
25. Judicial records	206
26. Mistake	207
27. Fraud — Parol evidence of	208
28. When written instrument may be contradicted	208

CHAPTER XI.

BURDEN OF PROOF.

I. BURDEN OF PROOF	211
§ 1. In general	211
2. Illustrations	213
3. Conditions, exceptions, waiver	213
4. Sufficient evidence to go to jury	214
II. CIVIL DAMAGES	215
III. PENALTIES	216
IV. LIMITATION OF ACTIONS	217
V. NEGLIGENCE	218
§ 5. In general	218
6. Presumption of negligence	220
7. Contributory negligence	220
8. Master and servant	221
9. Sleeping-car — Money on passengers	222
10. Implied admissions of negligence	222
11. Negligent or wrongful acts committed abroad	222
12. Telegraph messages — <i>Prima facie</i> case — Notice	224
VI. FRAUD	224
§ 13. Sufficiency of proof to carry case to jury	224
14. Innocence — Presumption of, in civil actions	225
15. Preponderance of proof sufficient	225
16. Continuous fraudulent transactions	225
17. Fraud to do away with a written agreement	226
18. Other frauds	226
19. Intent — When party may swear to it	227
20. Fictitious consideration fraudulently made up	228
21. Burden of proof on creditor to show fraud	228
22. To set aside an assignment for creditors	229
VII. CONVERSION, DEMAND	229
VIII. DEFENSES	229
§ 23. Illustrations	229
24. Illegality of contract	232
25. Usury	233
26. Constructive fraud — Burden of proof	234
IX. PAYMENT	235

	<i>Page.</i>
X. ASSIGNMENT	238
§ 27. In general	238
28. Presumed, when	238
29. Consideration of	238
30. Gift	239
31. Execution and delivery of	239
32. By trustees, executors, etc.	240
XI. CORPORATION AND CORPORATE EXISTENCE	240
§ 33. <i>De facto</i>	240
34. Estoppel by and against	243
35. Powers of corporations	244
36. Contracts of	244
37. Torts of	245
38. Books and papers of	246
XII. EXECUTORS AND ADMINISTRATORS	247
§ 39. Title	247
40. Acts and declarations of representatives	247
XIII. TESTIMONY OF INTERESTED WITNESSES AS TO TRANSACTIONS WITH DECEDENT	248
§ 41. In general	248
XIV. TO CHARGE NEXT OF KIN WITH ANCESTOR'S DEBT	250
XV. ADVANCEMENTS	250
XVI. WILLS	252
§ 42. Extrinsic evidence affecting	252
XVII. ADEPTION AND LAPSING	257
XVIII. CITIZENSHIP AND ALIENAGE	258
§ 43. In general	253
XIX. DEATH — PROOF OF	259
XX. MARRIAGE — PROOF OF	260
XXI. ISSUE AND LEGITIMACY	261
§ 44. Issue	261
45. Legitimacy	261
XXII. HUSBAND AND WIFE	262
§ 46. Title — Law of place	262
47. Agency of one for the other	262
48. Wife's title	263
49. Actions by and against wife	264
50. Actions by and against husband	265
XXIII. PUBLIC OFFICERS	266
§ 51. Title to office — When strict proof of is necessary	266
52. When strict proof of is not necessary	267
XXIV. PARTNERS AND JOINT CONTRACTORS	269
§ 53. Joint contractors	269
54. Partners — Proof of partnership	269
55. Partners — How far liable	271
56. Dissolution — Effect of	273

CHAPTER XII.

HEARSAY EVIDENCE.

	<i>Page.</i>
I. OF HEARSAY EVIDENCE	275
§ 1. In general	275
2. Hearsay — What is — When admissible	275
II. MATTERS OF PUBLIC AND GENERAL INTEREST	277
§ 3. Public interest — What is	277
4. Public and general — Distinction between	278
5. What matters involve public or general interest	279
6. Rights must be ancient and declarants dead	279
7. <i>Ante litem motam</i>	280
8. <i>Lis mota</i> — What is	280
9. Declarations <i>post litem motam</i>	281
10. Witness need not specify from whom he heard	281
11. What matters not admissible as hearsay	281
12. Particular facts	281
13. Maps, documents, etc.	282
III. HEARSAY AS TO FACTS OF FAMILY HISTORY	283
§ 14. In general	283
15. Facts that may be proved	284
16. By whose declarations proved	285
17. Marriage	286
18. Family records	287
19. Old documents, inscriptions, etc.	288
20. Declarations of deceased persons	288
21. Of other persons, admissible when	289
22. Declarations made in view of controversy	289
23. When declarant alive	290
24. Public records	290
25. Recital of public facts in statutes, etc.	291

CHAPTER XIII.

HEARSAY EVIDENCE (CONTINUED).

I. OF ANCIENT POSSESSION	292
§ 1. In general	292
2. Declarations accompanying possession	293
3. Private titles — Hearsay not admissible as to	294
4. Maps	294
5. Perambulations	295
6. Modern exercise of right	295
7. Private boundaries — Hearsay to establish	295
8. Deceased surveyors — Declarations of	296
9. Owner's declarations	296
II. DYING DECLARATIONS	297
§ 10. In general	297
11. To material matters only	298

	<i>Page.</i>
§ 12. Declarations must be complete	299
13. Weight to be given dying declarations	299
III. DECLARATIONS AGAINST INTEREST	299
§ 14. In general	299
15. Conditions precedent to admission	300
16. Admissions of deceased grantor	301
17. Declarations of decedent against his representatives	301
18. Declarations of testator as to contents of lost will	302
19. Donor	302
IV. MEMORANDA	302
§ 20. Entries by public officer from reports by other officer	302
V. SHOP-BOOKS, ACCOUNT-BOOKS, ETC.	304
§ 21. In general	304
22. Time of entry material when	307
VI. MEMORANDA AS EVIDENCE	308
§ 23. In general	308
24. Refreshing memory by	308
25. When memoranda must be made by witness	310
26. When witness need not have recollection independent of memorandum	311
27. Memoranda primary evidence when	311
VII. EVIDENCE GIVEN IN A FORMER PROCEEDING	312
§ 28. In general	312
29. Same parties — Cross-examination	314
30. Mode of proof	314
VIII. MISCELLANEOUS	314
IX. BOOKS OF CORPORATIONS AS EVIDENCE	316
§ 31. In general	316
32. Records of corporations	319
33. Against whom competent	319
34. Minutes proved by parol when	320
35. Authentication of corporate records	320
36. Parol evidence to vary corporate minutes	320
37. Accounts and business entries	321

CHAPTER XIV.

HEARSAY EVIDENCE (CONTINUED).

RES GESTÆ.

I. OF THE RES GESTÆ	322
§ 1. In general	323
2. Tests for determining when a declaration is	324
3. Continuing circumstances, when <i>res gestæ</i>	325
4. Declarations of agent or representative	326
5. Illustrations	327
6. Statement of party injured to his physician and others	330

	<i>Page.</i>
II. DECLARATIONS OF ASSIGNOR AGAINST ASSIGNEE	333
§ 7. In general	333
8. Declarations before vendor became owner	335
9. Vendor of chattels or choses in action	336
10. Made at time of selling	338
11. Vendee must be a purchaser for value to exclude decla- rations	339
12. Declarations of assignor for benefit of creditors prior to assignment	339
13. Illustrations	339
III. CONSPIRATORS — DECLARATIONS OF	348
§ 14. In general	348
15. Criminal conspiracy	349
16. Illustrations	350
17. Declarations as to ownership	352
18. Acts and declarations as to fraud and fraudulent convey- ances	352
19. Acts and declarations of or in presence of donor, testator or intestate	354
20. Telephone conversation	355

CHAPTER XV.

OPINIONS AND CONCLUSIONS.

I. OF OPINIONS AND CONCLUSIONS	357
§ 1. In general	357
2. General rule	359
3. Illustrations	361
4. When opinions allowable	364
5. Opinions not allowable when	368
II. FORM OF QUESTIONS AND ANSWERS	371
III. WHAT WITNESSES MAY STATE OPINIONS	378
IV. OPINIONS AS TO QUANTITY, DISTANCE, SPEED, TIME	379
V. CARE, SKILL, NEGLIGENCE — PROPER CAUSE OF ACTION	381
VI. SANITY AND MENTAL CAPACITY	386
VII. MOTIVES, INTENT, THOUGHTS, BELIEF	390
VIII. OPINIONS AS TO LEGAL QUESTIONS	393
IX. PHYSICAL CONDITIONS	394
X. HANDWRITING	399
XI. APPEARANCE, IDENTITY, AGE, QUALITY	404
XII. LOCATION, LANGUAGE	407
XIII. MISCELLANEOUS	408
XIV. OPINIONS OF NON-EXPERTS	409

CHAPTER XVI.

PRESUMPTIVE EVIDENCE.

	<i>Page.</i>
I. OF PRESUMPTIVE EVIDENCE IN GENERAL	410
§ 1. Definition	410
2. Presumptions in general	411
3. Circumstances and presumptions — Difference between	412
4. Presumptions <i>juris et de jure</i>	412
5. No arbitrary rule of presumption fixed	413
6. Circumstances inflexible proof when	413
7. Every one is presumed to know the law when	415
8. Estoppels as presumptions	416
II. PRESUMPTIONS THAT OFFICERS DO THEIR DUTY	417
§ 9. Public officers	417
10. Concerning person's <i>status</i>	417
11. A party presumed to know the contents of a writing signed by him	418
III. INTEREST OF HUSBAND AND WIFE	418
IV. A PARTY MUST SHOW A FACT OF WHICH HE IS BEST COGNIZANT	419
V. PRESUMPTION OF JURISDICTION OF COURT	420
§ 12. General jurisdiction	420
13. Regularity of proceedings presumed when	420
14. Limited jurisdiction — Courts of	421
VI. PRESUMPTION AS TO CARRIERS, BAILEES, ETC.	422
§ 15. Negligence of	422
16. In an accident case	422
17. By tugs, ships, etc.	424
18. By carriers as to passengers	424
19. Contributory negligence	425
20. As to property	426
21. By railroad trains	427
VII. OFFICIAL ACTS — PRESUMPTION OF AUTHORITY	428
§ 22. Proof of official capacity	428
VIII. PRESUMPTION THAT THE USUAL COURSE OF BUSINESS WAS FOLLOWED	429
IX. AGREEMENT TO PAY FOR SERVICES PRESUMED WHEN	430

CHAPTER XVII.

PRESUMPTIVE EVIDENCE (CONTINUED).

§ 1. Presumption as to negotiable paper	431
2. Presumption as to consideration of commercial paper	433
3. Presumption as to protest of bills or notes	433
4. Presumption as to receipt of letter from mailing	433
5. Presumption as to documents regular on their face	434
6. Presumption as to correctness of date	434

	<i>Page.</i>
§ 7. A person presumed to act honestly	434
8. Presumption as to marriage	436
9. Presumption as to legitimacy	436
10. Presumption against a spoliator	436
11. Alteration, suppression, destruction or manufacturing of evidence	437
12. Presumption of continuance of things	438
13. Domicile, residence, solvency, infancy, partnership	440
14. Sanity or insanity	441
15. Character and habits of persons	441
16. Presumptions not retrospective	442
17. Presumption of life	442
18. Persons presumed to be dead when	442
19. Absentees — Who are	443
20. Not been heard of — Meaning of	443
21. Absentee's residence — Meaning of	444
22. Presumption of death before seven years	444
23. When presumption of death after seven years does not arise	446
24. Presumption of survivorship of persons who perished in the same accident	446
25. Where age, sex or health may raise a presumption of survivorship	447
26. Presumption of identity	447
PRESUMPTION OF INTENT	448
§ 27. In general	448
28. Revocation of will	448
29. When the doing of an act does not raise a presumption	450
30. A person is presumed to do what he has the right and power to do	450
31. Presumptions from the course of nature	450
32. A person is presumed to do what it is his interest to do	451
33. Presumption of payment	451
34. Other than by the lapse of time	452

CHAPTER XVIII.

PRESUMPTIVE EVIDENCE (CONTINUED).

I. FOREIGN LAWS	454
§ 1. Presumed to be the same as the laws of the forum	454
2. Acts <i>malum in se</i>	455
3. When there is no presumption that the common law is in force in a state or country	456
4. The term "law" does not include the statute law of the forum	456
II. PRESUMPTION AS TO ALTERATION OF INSTRUMENT	456
§ 5. Alteration presumed to have been made before execution	456
6. When party offering an altered paper must explain it	457

	<i>Page.</i>
III. AS TO RECEIPT OF LETTERS	458
IV. AGENCY, AUTHORITY	458
V. AS TO DELIVERY OF DEED, ETC.	458
VI. PRESUMPTION FROM POSSESSION AND LAPSE OF TIME	459
§ 7. Lawful origin presumed from possession	459
8. Legal title presumed from possession	460
VII. INNOCENCE — PRESUMPTIONS IN FAVOR OF	460
§ 9. In general	460
10. Absence of motive	461
11. Good character of party accused	461
12. <i>Alibi</i>	462
VIII. WHAT THE PROSECUTION MUST ESTABLISH	462
§ 13. In general	462
14. <i>Corpus delicti</i>	463
15. Discovery of the body in case of murder	463
16. Cause of death	464
17. Infanticide	464
IX. PRESUMPTION OF GUILT	465
§ 18. In general	464
19. Motive	466
20. From attempt or preparation to accomplish the same crime at another time	466
21. From threats or expressions of ill-will	467
22. From recent possession of the fruits of the crime	467
23. Unexplained suspicious appearances	468
24. From attempts to stifle investigation	469
25. Concealment, disguise, flight, etc.	469
26. From silence of accused when charged with the crime	470
27. Spoliation of evidence	470
28. Affectation of grief and fabrication of evidence	470
29. Proof of identity of the person or thing	471
X. PRESUMPTION AGAINST CRIME	472

CHAPTER XIX.

DAMAGES — PRACTICE AS TO PROOF OF.

I. MANNER OF PROVING VALUE IN ACTIONS FOR PROPERTY OR SERVICES	473
§ 1. In general	473
2. Presumption of damages	474
3. Expert evidence of value	474
4. What witnesses allowed to give opinions as to value	475
5. Illustrations	476
6. Offers made for property	481
7. Price paid — Sales	482
8. By sales or value of other property	483
9. Sum inserted in deed no evidence of value	486

	<i>Page.</i>
§ 10. Where there is no market value	487
11. Work, labor and services	487
12. Proof of value in actions on special contract	488
13. Benefit to premises	488
II. PECUNIARY CONDITION OF PARTY	488
§ 14. In general	488
15. Breach of promise of marriage—Reputation of defend- ant's wealth	489
III. LIBEL—REPETITION OF	490
§ 16. In general	490
17. Repetition of libel after action commenced	491

CHAPTER XX.

PRACTICE IN ADMISSION AND REJECTION OF EVIDENCE.

I. EXAMINATION IN CHIEF	492
§ 1. Leading questions not allowed when	492
2. Cross-examination	493
3. Examination as to previous statements in writing	494
4. Re-examination	494
5. Limit of extent of whole conversation	495
6. Whole writing—Limit of rule as to	496
7. Papers made at different times	496
II. OBJECTION TO EVIDENCE	496
§ 8. In general	496
9. When general objection sufficient	498
10. When objection must assign the particular ground	498
11. One objection to same class of evidence sufficient	499
12. Answer irresponsible in part—Remedy of opposite party	499
13. Questions by co-defendant	499
14. Direction to disregard evidence	500
15. When motion to strike out comes too late	500
16. Objection—When to be made	500
III. EXCEPTIONS	501
IV. CRIMINAL EVIDENCE	501
§ 17. In general	501
18. Motive—Other crimes	501
19. Insanity	502
20. Communications to defendant	503
21. Threats by deceased	504
22. Threats by defendant	504
23. Malice	505
24. Accomplice—Corroboration, when necessary	505
25. Who are not accomplices	505
V. FALSE IMPRISONMENT—MALICE	506
VI. JUDGMENTS	506

VII. RES ADJUDICATA	506
§ 26. In general	506
27. Not pleaded	507
28. Between strangers	507
29. Adjudication	508
30. Parol evidence to show	508
31. Defenses	508
32. Surrogate's court	508
33. Judgment in criminal case not evidence in civil case	509
VIII. ESTOPPEL	509
§ 34. In general	509
35. Insurance — Preliminary proof not conclusive	510
36. In relation to <i>bona fide</i> purchasers of commercial paper	511

TABLE OF CASES.

The references are to pages.

A.

- Aaron v. State (37 Ala. 106), 115.
 Aaronson v. McCauley (46 N. Y. State Rep. 564), 264.
 Abbott v. Dwinnell (74 Wis. 514), 377.
 Abbott v. Heath (84 Wis. 314), 399.
 Abbott v. Seventy-six L. & W. R. Co. (87 Cal. 323), 328.
 Abbott v. Stanley (77 Tex. 309), 135.
 Abel v. Brewster (58 Hun, 605; 34 N. Y. State Rep. 402), 458.
 Abel v. State (90 Cal. 631), 275.
 Abenheim v. Samuel (16 N. Y. State Rep. 907), 375.
 Abercrombie v. Allen (29 Ala. 281), 106.
 Abercrombie v. Stillman (77 Tex. 589), 460.
 Accerro v. Petroni (1 Stark. 100), 493.
 Achilles v. Achilles (127 Ill. 589), 78.
 Acker v. Bender (37 Ala. 230), 178.
 Ackley v. People (9 Barb. 609), 16.
 Acklia v. Hickman (63 Ala. 594; 35 Am. Rep. 54), 310.
 Adamant Plaster Co. v. National Bank (5 Wash. 232), 166.
 Adams v. Adams (22 Vt. 50), 251.
 Adams v. Davidson (10 N. Y. 309), 337.
 Adams v. Guice (30 Miss. 397), 127.
 Adams v. Insurance Co. (7 Cow. 202), 247.
 Adams v. Maine (3 Ind. App. 232), 265.
 Adams v. Olin (64 Hun, 268; 46 N. Y. State Rep. 336), 304.
 Adams v. People (3 Hun, 654), 312.
 Adams v. State (28 Fla. 511), 139.
 Adams v. State (25 Ohio St. 585), 215.
 Adams County v. Cunningham (81 Wis. 440), 89.
 Aep v. Jacobs (Wyo., 27 Pac. Rep. 800), 263.
 Ætna Life Ins. Co. v. Deming (123 Ind. 384), 57.
 Ætna Life Ins. Co. v. Ward (140 U. S. 76), 230.
 Agricultural Ins. Co. v. Potts (55 N. J. L. 158), 327.
 Akberg v. John Kress Brew. Co. (65 Hun, 185; 47 N. Y. State Rep. 373), 186.
 Alabama Connellsville Coal & J. Co. v. Pitts (Ala., 13 S. Rep. 135), 384.
 Alabama G. S. R. Co. v. Carroll (53 Am. & Eng. Ry. Cas. 556), 223.
 Alabama G. S. R. Co. v. Frazier (93 Ala. 45), 486.
 Alabama G. S. R. Co. v. Hill (93 Ala. 514), 367.
 Alabama, etc. R. Co. v. Nabors (37 Ala. 489), 318.
 Alabama Midland R. Co. v. Brown (Ala., 13 S. Rep. 70), 208.
 Alabama Midland R. Co. v. Corskey (92 Ala. 254), 138.
 Albany v. McNamara (117 N. Y. 168; 27 N. Y. State Rep. 165), 429.
 Albatross v. Wayne (16 Ohio, 513), 171.
 Albert v. Sweet (116 N. Y. 363; 26 N. Y. State Rep. 738), 379.
 Alberti v. N. Y., L. E. & W. R. Co. (43 Hun, 421), 374.

The references are to pages.

- Alberti v. N. Y., L. E. & W. R. Co.
(118 N. Y. 77; 27 N. Y. State Rep.
865), 59, 141.
- Albin v. Lord (39 N. H. 205), 262.
- Alexander v. Thompson (42 Minn.
498), 187.
- Alexander v. United States (138 U. S.
353), 49.
- Alford v. Baker (53 Ind. 279), 455.
- Alger v. Johnson (6 S. C. (T. & C.)
632), 35.
- Alger v. Kennedy (49 Vt. 149), 195.
- Alleman v. Manning (44 Mo. App. 4),
251.
- Allen v. Allen (48 Minn. 462), 194.
- Allen v. Bishop (25 Wend. 414), 247.
- Allen v. Chouteau (102 Mo. 309), 81.
- Allen v. Com. (11 Ky. L. Rep. 555),
351.
- Allen v. De Groodt (105 Mo. 442), 458.
- Allen v. Grove (18 Pa. St. 377), 297.
- Allen v. Killenger (8 Wall. 480), 112.
- Allen v. Patterson (7 N. Y. 476), 35.
- Allen v. Union Pacific R. Co. (7 Utah,
239), 376.
- Alliger v. Mail Press Ass'n (66 Hun,
626; 49 N. Y. State Rep. 495),
474.
- Alloway v. Nashville (88 Tenn. 510),
241.
- Alvion v. Furnival (1 C., M. & R. 277,
291), 129.
- Amadon v. Ingersoll (34 Hun, 132),
364.
- Ambler v. Phillip (132 Pa. St. 167),
377.
- American Elec. Constr. Co. v. Con-
sumers' Gas Co. (47 Fed. Rep. 43),
206.
- American Life Ins. Co. v. Rosenagle
(77 Pa. St. 507), 284.
- American Oak Leather Co. v. Stand-
ard Gig Saddle Co. (Utah, 33 Pac.
Rep. 246), 223.
- American Union Tel. Co. v. Daughty
(Ala., 7 S. Rep. 660), 813.
- American Wire Nail Co. v. Bayless
(91 Ky. 94), 246.
- Ames v. Chicago, St. P., M. & O. R.
Co. (44 Minn. 266), 447.
- Ames v. Palmer (43 Me. 197), 459.
- Amherst Bank v. Root (2 Metc. 522),
111.
- Anderson v. Edwards (123 Mass. 273),
311.
- Anderson v. McAleenan (29 N. Y.
State Rep. 406), 330.
- Anderson v. Middle & E. T. C. R. Co.
(91 Tenn. 44), 188.
- Anderson v. Monroe (55 Fed. Rep.
396), 232.
- Anderson v. Prairie School Tp. (Ind.
App., 27 N. E. Rep. 439), 214.
- Anderson v. Rome, etc. R. Co. (54 N.
Y. 334), 246.
- Anderson v. Shiel (Tex., 18 S. W.
Rep. 464), 263.
- Andrews v. Brewster (124 N. Y. 433;
36 N. Y. State Rep. 412), 181.
- Andrews v. Motley (12 C. B. (N. S.)
526), 434.
- Andrews v. Youmans (82 Wis. 81),
139.
- Andrus v. Foster (17 Vt. 556), 430.
- Angell v. Duke (L. R. 10 Q. B. 174),
197.
- Angell v. Pickard (61 Mich. 561), 390.
- Anis v. Charlton's Adm'r (12 Gratt.
484), 21.
- Annis v. Wilson (15 Colo. 236), 203.
- Anonymous (Ala., 7 S. Rep. 100), 138.
- Anthoine v. Coit (N. Y., 2 Hall, 40),
117.
- Applebee v. Albany Brew. Co. (58
Hun, 605; 34 N. Y. State Rep.
671), 408.
- Appolos v. Brady (49 Fed. Rep. 401),
154.
- Archer v. Helm (69 Miss. 730), 325.
- Archibald v. State (122 Ind. 122), 298.
- Arff v. State F. Ins. Co. (125 N. Y. 57;
34 N. Y. State Rep. 366), 164.
- Argotsinger v. Vines (82 N. Y. 308),
366.
- Argus Co. v. Mayor, etc. (55 N. Y.
495), 245.

The references are to pages.

- Armsby v. Eckerly (42 Mo. App. 299), 150.
 Armstrong v. Burrows (6 Watts, 266), 403.
 Armstrong v. Chicago, M. & St. P. R. Co. (45 Minn. 85), 165, 383.
 Armstrong v. Garrow (6 Cow. 465), 268.
 Armstrong v. State (30 Fla. 170), 387.
 Armstrong v. United States (13 Wall. 154), 291.
 Armstrong v. Weed (62 N. Y. 250), 40.
 Armstrong v. Wing (10 Hun, 520), 250.
 Arnold v. Arnold (13 Vern. 363), 68.
 Arnold v. Cheesebrough (41 Fed. Rep. 74), 52.
 Arnold v. Cheesebrough (46 Fed. Rep. 700), 22.
 Arnold v. Jones (26 Tex. 335), 192.
 Ashley v. Martin (50 Ala. 537), 96.
 Astor v. N. Y. Arcade R. Co. (113 N. Y. 93; 22 N. Y. State Rep. 1), 242.
 Astor v. Union Ins. Co. (7 Cow. 202), 172.
 Atchison v. Rose (43 Kan. 605), 477.
 Atchison, T. & S. R. Co. v. Headland (20 L. R. A. 822), 101.
 Atchison, T. & S. R. Co. v. Walton (3 N. M. 319), 427.
 Atherton v. Tilton (44 N. H. 452), 270.
 Atkeson v. Lay (Mo., 48 Alb. L. J. 89), 96.
 Atkins v. State (16 Ark. 568), 21.
 Atkinson v. Truesdale (127 N. Y. 230; 38 N. Y. State Rep. 159), 150.
 Atkinson's Lessee v. Cummings (9 How. (U. S.) 479, 486), 149.
 Atlanta v. Schmeltzer (83 Ga. 609), 158.
 Atwater v. Clancy (107 Mass. 369), 206.
 Atwell v. Lynch (39 Mo. 519), 135.
 Atwood v. Canriker (86 Mich. 99), 282.
 Auerbach v. Peetsch (44 N. Y. State Rep. 493), 432.
 Auerbach v. Wylie (84 Tex. 615), 450.
 Augusta v. Hudson (88 Ga. 599), 221.
 Augusta & S. R. Co. v. Randall (Ga., 11 S. E. Rep. 716), 313.
 Aultman v. Falkum (Minn., 53 N. W. Rep. 875), 186.
 Aultman & T. Co. v. Gorham (87 Mich. 233), 189.
 Aurora v. West (7 Wall. 82), 508.
 Austin v. Holland (69 N. Y. 571), 274.
 Austin v. Williams (2 Ohio St. 64), 168.
 Autanqua Co. v. Davis (32 Ala. 713), 345.
 Averill v. Sawyer (62 Conn. 520), 145.
 Avery v. Avery (49 Cal. 193), 308.
 Avery v. N. Y. C. & H. R. R. Co. (121 N. Y. 31; 17 N. Y. State Rep. 417), 378.
 Avery v. N. Y. C. & H. R. R. Co. (121 N. Y. 31; 30 N. Y. State Rep. 471), 474.
 Ayers v. Ayers (28 Mo. App. 97), 62.
 Ayers v. Harris (77 Tex. 108), 137.
 Ayers v. Hewitt (19 Me. 281), 122.
 Ayers v. Watson (137 U. S. 584), 282.
 Ayers v. Weed (16 Conn. 291), 256.
 Ayers v. Weeks (6 L. R. A. 716), 259.

B.

- Babbage v. Powers (130 N. Y. 281; 41 N. Y. State Rep. 521), 93.
 Babcock v. Bruen (2 Hill, 181), 247.
 Backdahl v. Grand Lodge A. O. U. W. (46 Minn. 61), 284.
 Backer v. Meyer (43 Fed. Rep. 702), 419.
 Backus v. Richardson (5 Johns. 476), 28.
 Bacon v. Chesney (1 Stark. 192), 110.
 Badische A. & S. T. v. Schott (1892, 3 Ch. 447), 232.
 Bagley v. Grand Lodge A. O. U. W. (131 Ill. 498), 317.
 Bagley v. Kennedy (85 Ga. 703), 459.
 Bagley v. Mickle (9 Cal. 430), 135.
 Bagley & S. Co. v. Saranac River P. & P. Co. (62 Hun, 618; 41 N. Y. State Rep. 864), 159.

The references are to pages.

- Bagley & S. Co. v. Saranac River P. & P. Co. (135 N. Y. 626; 48 N. Y. State Rep. 444), 153, 157.
- Bailey v. Bailey (36 Mich. 185), 443.
- Bailey v. Bidwell (13 M. & W. 73), 122.
- Bailey v. Kalamazoo Pub. Co. (40 Mich. 251), 94.
- Bailey v. Rome, W. & O. R. Co. (55 Hun, 509; 29 N. Y. State Rep. 755), 364.
- Bailey v. Show (24 N. H. 300), 438.
- Bailey v. Wood (24 Ga. 164), 276.
- Baird v. Cochran (4 Serg. & Rawle, 400), 49.
- Baird v. Daly (68 N. Y. 547), 358.
- Baird v. Slight (55 Hun, 603; 28 N. Y. State Rep. 667), 341.
- Baker v. Gaisin (76 Ind. 316), 346.
- Baker v. Josephs (16 Cal. 173), 22.
- Baker v. Northeast (151 Pa. St. 234), 221.
- Baker v. Stackpool (9 Cow. 420), 113.
- Baker v. State (30 Fla. 41), 372.
- Baker v. State (80 Wis. 416), 350.
- Baldrige, etc. Bridge Co. v. Castrett (75 Tex. 628), 391.
- Baldwin v. Doying (114 N. Y. 452; 23 N. Y. State Rep. 759), 235.
- Baldwin v. Martin (14 Abb. Pr. (N. S.) 9), 217.
- Baldwin v. Short et al. (125 N. Y. 553; 36 N. Y. State Rep. 138), 228.
- Baldwin v. U. S. Tel. Co. (45 N. Y. 744), 223.
- Baldwin v. Walker (91 Ala. 428), 390.
- Ball v. Independence (41 Mo. App. 469), 105.
- Ball v. Loomis (29 N. Y. 416), 341.
- Ballard v. Carmichael (83 Tex. 355), 135.
- Ballou v. Earle (R. L., 45 Alb. L. J. 44), 418.
- Baltimore & L. T. Co. v. Cassell (66 Md. 419; 59 Am. Rep. 175), 366.
- Baltimore & T. R. Co. v. Grimes (71 Md. 573), 425.
- Bamford v. Barton (2 M. & Rob. 28), 289.
- Bangor, etc. R. Co. v. Smith (47 Me. 34), 107.
- Bangs v. Brewster (111 Mass. 382), 259.
- Bank v. Kennedy (17 Wall. 19), 323.
- Bank v. Mead (92 N. Y. 637), 228.
- Bank of Albion v. Burns (46 N. Y. 170), 263.
- Bank of British America v. Delafield (126 N. Y. 418; 37 N. Y. State Rep. 864), 108.
- Bank of Commerce v. Mayor (42 La. Ann. 1081), 272.
- Bank of Jamaica v. Jefferson (Tenn., 22 S. W. Rep. 211), 189.
- Bank of Northern Liberties v. Davis (6 Watts & Serg. 285), 19.
- Bank of Osceola v. Outhwaite (50 Mo. App. 124), 112.
- Bank of Toledo v. International Bank (21 N. Y. 542), 242.
- Bank of United States v. Dandridge (12 Wheat. 64, 70), 144.
- Bank of United States v. Dunn (6 Pet. 51, 57), 143.
- Bank of Utica v. Mersereau (3 Barb. Ch. 528), 50.
- Bank of Utica v. Smedes (3 Cow. 684), 89.
- Bank of Utica v. Smith (18 Johns. 230), 167.
- Banks v. Martin (Tex., 18 S. W. Rep. 964), 340.
- Barbee v. Barbee (108 N. C. 581), 179.
- Barbee v. Barbee (109 N. C. 299), 251.
- Barber v. Lyon (23 Barb. 62), 437.
- Barclay v. Capeland (86 Cal. 492), 348.
- Barclay v. Howell's Lessees (6 Pet. 498), 296.
- Barclay v. Poesley (110 Pa. St. 13), 151.
- Bardin v. Stevenson (75 N. Y. 164), 499.
- Bar Harbor F. Nat. Bank v. Kingsley (84 Me. 111), 92.

The references are to pages.

- Barker v. Binninger (14 N. Y. 270), 107.
 Barker v. Bradley (42 N. Y. 316), 202.
 Barker v. Marvin (11 Allen, 322), 331.
 Barker v. Smith (92 Mich. 336), 340.
 Barker v. White (58 N. Y. 204), 248.
 Barnard v. Barlow (50 N. J. Eq. 131), 157.
 Barnard v. Campbell (55 N. Y. 456, 462), 509.
 Barnard v. Gall (43 La. Ann. 959), 89.
 Barnard v. Kellogg (10 Wall. 383), 156.
 Barnes v. Harris (7 Cush. 576), 50.
 Barnes v. Mawson (1 M. & S. 81), 279.
 Barnes v. Moore (86 Mich. 585), 265.
 Barnes v. State (88 Ala. 204), 343.
 Barnett v. Glutting (3 Ind. App. 415), 437.
 Barney v. Forbes (118 N. Y. 580; 29 N. Y. State Rep. 980), 179.
 Barney v. Fuller (133 N. Y. 605; 44 N. Y. State Rep. 902), 371.
 Barney v. Schneider (9 Wall. 248, 253), 129.
 Barnum v. Bridges (81 Cal. 604), 481.
 Baron v. Crombie (14 Mass. 234), 313.
 Baron De Bode's Case (8 Q. B. 250, 267), 360.
 Barrett v. Davis (104 Mo. 549), 176.
 Barrida v. Silsbee (21 How. (U. S.) 146), 209.
 Barron v. Paine (83 Me. 312), 439.
 Barrows v. Downs (9 R. I. 447), 360.
 Barry v. Coville (53 Hun, 620; 25 N. Y. State Rep. 658), 52.
 Barry v. Coville (129 N. Y. 302; 41 N. Y. State Rep. 628), 205.
 Barry v. Second Ave. R. Co. (49 N. Y. State Rep. 705), 381.
 Bartholemy v. People (2 Hill, 249), 68.
 Bartlett v. Bunn (56 Hun, 507; 31 N. Y. State Rep. 319), 53.
 Bartlett v. Cheesebrough (32 Neb. 339), 123.
 Bartlett v. Wright (29 Ill. App. 339), 419.
 Bartley v. Trorlicht (49 Mo. App. 214), 474.
 Barton v. Kirk (157 Mass. 303), 221.
 Barton v. Lynch et al. (52 N. Y. State Rep. 540), 200.
 Bass v. Gregory (L. R. 25 Q. B. D. 481), 459.
 Bassett v. Martin (83 Tex. 339), 253.
 Batchelder v. Sanborn (22 N. H. 325), 307.
 Bateman v. Bailey (5 T. R. 513), 109.
 Bates v. Commonwealth (14 Ky. L. Rep. 177), 299.
 Bates v. Davis (76 Ill. 222), 216.
 Bates v. Lingerwood (50 Hun, 420; 20 N. Y. State Rep. 778), 335.
 Bates v. Rosekrans (37 N. Y. 409), 27.
 Bates v. Stanton (1 Duer, 79), 187.
 Batterman v. Pierce (3 Hill, 171), 197.
 Baughn v. Brown (122 Ind. 115), 323.
 Baxter v. Baxter (57 N. Y. State Rep. 458), 509.
 Baxter v. Duree (50 Am. Dec. 602; 29 Me. 434), 415.
 Bayless v. Cockcroft (81 N. Y. 371), 227.
 Beach v. Raritan & D. B. R. Co. (37 N. Y. 457), 487.
 Beach v. United States (14 Sawy. 549), 470.
 Beakis v. Da Cunda (126 N. Y. 233; 37 N. Y. State Rep. 14), 150.
 Beal v. Fisher (95 Cal. 568), 186.
 Beals v. Clark (12 Gray, 18), 448.
 Bean v. American L. & T. Co. (122 N. Y. 622; 34 N. Y. State Rep. 620), 246.
 Beard v. Illinois C. R. Co. (79 Iowa, 518), 416.
 Beard v. Minneapolis First Nat. Bank (41 Minn. 153), 340.
 Beard v. Tilghman et al. (66 Hun, 12; 49 N. Y. State Rep. 508), 41.
 Beardsley v. Crane (Minn., 54 N. W. Rep. 740), 153.
 Beardsley v. Gaylord (65 Hun, 624; 48 N. Y. State Rep. 53), 209.
 Beasley v. San Jose Fruit Packing Co. (70 Cal. 388), 329.
 Beattie v. Qua (15 Barb. 137), 306.

The references are to pages.

- Beaudeau v. Cape Girardeau (71 Mo. 392), 123.
- Bechstein v. Sammis (10 Hun, 585), 268.
- Beck v. Dowell (111 Mo. 506), 489.
- Becker v. Boon (61 N. Y. 317), 228.
- Becker v. Metropolitan El. R. Co. (131 N. Y. 511; 43 N. Y. State Rep. 726), 475.
- Beckwith v. N. Y. C. & H. R. Co. (125 N. Y. 759; 28 N. Y. State Rep. 292), 428.
- Bedell v. Berkey (76 Mich. 435), 139.
- Bedell v. Commercial Ins. Co. (3 Bosw. (N. Y.) 147), 112.
- Beekman v. Platner (15 Barb. 552), 34.
- Behrens v. Behrens (47 Ohio St. 323; 42 Alb. L. J. 436), 355.
- Behrensmeyer v. Kreitz (135 Ill. 591), 94.
- Behrman v. Linde (47 Hun, 530; 15 N. Y. State Rep. 129), 158.
- Belcher v. Farren (89 Cal. 73), 123.
- Belcher v. State (125 Ind. 419), 351.
- Belden v. Meeker (47 N. Y. 307), 239.
- Bell v. Anderson (74 Wis. 638), 439.
- Bell v. Bumstead (60 Hun, 580; 38 N. Y. State Rep. 393), 284.
- Bell v. Howe (65 Hun, 625; 47 N. Y. State Rep. 86; 19 N. Y. Supp. 569), 77.
- Bell v. McMaster (29 Hun, 272), 374.
- Bell's Case (1 Browne, 376), 49.
- Bellinger v. N. Y. C. R. Co. (28 N. Y. 42), 358.
- Belmont v. Morrill (69 Me. 314), 93.
- Belthone v. Hale (45 Ala. 522), 95.
- Bemis v. McKenzie (13 Fla. 553), 99.
- Benedict v. Grand Lodge A. O. U. W. (48 Minn. 471), 458.
- Benesch v. John Hancock Mut. L. Ins. Co. (32 N. Y. State Rep. 73), 240.
- Benesley v. Brockway (27 Ill. App. 410), 327.
- Benjamin v. Metropolitan St. R. Co. (50 Mo. App. 602), 384.
- Benjamin v. Rogers (126 N. Y. 60; 36 N. Y. State Rep. 393), 339.
- Benjamin v. Shea (83 Iowa, 392), 396.
- Benedict v. Seventh Ward R. Co. (51 Hun, 111; 24 N. Y. State Rep. 169), 8.
- Benner v. Atlantic Dredging Co. (134 N. Y. 156; 46 Alb. L. J. 64; 45 N. Y. State Rep. 774), 44.
- Bennett v. Austin (5 Hun, 536), 249.
- Bennett v. Biddle (150 Pa. St. 420), 340.
- Bennett v. Cook (28 S. C. 353), 355.
- Bennett v. Holmes (32 Ind. 108), 108, 270.
- Bennett v. Libhart (27 Mich. 489), 448.
- Bennett v. McConnell (88 Ga. 177), 417.
- Bennett v. Smith (23 Hun, 50), 227.
- Benson v. Morgan (26 Ill. App. 22), 230.
- Benthall v. Judkins (12 Metc. 265), 434.
- Bentley v. Brown (123 Ind. 552), 206.
- Bentley v. Cooke (3 Doug. 422), 76.
- Bentley v. Phelps (27 Barb. 524), 266.
- Bentley v. Wood (116 Mass. 333), 307.
- Benton v. Martin (52 N. Y. 570), 182.
- Berg v. Peterson (49 Minn. 420), 404.
- Bergin v. Producers' Marble Co. (72 Tex. 53), 353.
- Bergquist v. Chandler Iron Co. (49 Minn. 511), 332.
- Berkhalten v. Edwards (16 Ga. 595), 19.
- Berlin v. Gorman (34 N. H. 266), 242.
- Berlin v. Norwich (10 Johns. 229), 190.
- Bernheimer v. Rindskoff (116 N. Y. 428), 435.
- Berry v. Cooper (28 Ga. 543), 167.
- Berry v. Kawalsky (95 Cal. 134; 28 Am. St. Rep. 548), 253.
- Berry v. State (30 Tex. App. 423), 391.
- Berryman v. Wise (4 T. R. 366), 128.
- Bersch v. State (13 Ind. 434), 21.
- Betts v. Badger (12 Johns. 223), 193.

The references are to pages.

- Beville v. Jones (74 Tex. 148), 335.
 Bevis v. Baltimore & O. R. Co. (26 Mo. App. 19), 327.
 Biddle v. Bond (34 L. J. Q. B. 137), 510.
 Bier v. Standard Mfg. Co. (130 Pa. St. 446), 408.
 Biering v. Gulf, C. & S. F. R. Co. (79 Tex. 584), 427.
 Bigelow v. Foss (59 Me. 162), 104.
 Bigelow v. Wilson (Iowa, 54 N. W. Rep. 465), 208.
 Bills v. City of Ottumwa (35 Iowa, 109), 368.
 Bingham v. State (123 Ind. 281), 239.
 Bird v. Everard (53 N. Y. State Rep. 210), 482.
 Birmingham N. R. Co. v. Hale (90 Ala. 8), 342.
 Bischoff v. N. Y. El. Co. (138 N. Y. 257; 52 N. Y. State Rep. 374), 475.
 Bissell v. Bissell (55 Barb. 325), 260.
 Bissell v. Campbell (54 N. Y. 353), 171.
 Bissell v. Cornell (24 Wend. 354), 17.
 Bissell v. Michigan S. & N. J. R. Co. (22 N. Y. 258), 244.
 Bitely v. Bitely (85 Mich. 227), 204.
 Black v. Nease (37 Pa. St. 436), 262.
 Black v. Ward (27 Mich. 191), 216.
 Black v. Woodson (39 Md. 194), 317.
 Blackburn v. Crawford (3 Wall. 187), 285.
 Blackman v. Reilly (138 N. Y. 318; 52 N. Y. State Rep. 865), 282.
 Blade v. Chicago, etc. R. Co. (10 Wis. 4), 192.
 Blade v. Noland (12 Wend. 173), 516.
 Blaesi v. Blaesi (15 N. Y. State Rep. 672), 85.
 Blair v. Bartlett (75 N. Y. 150), 506.
 Blair v. Madison County (81 Iowa, 313), 342.
 Blair v. Seaver (2 Casey, 274), 68.
 Blair v. Wait (69 N. Y. 113), 235.
 Blake v. Fash (44 Ill. 302), 127.
 Blake v. Frost (44 Ill. 102), 135.
 Blake v. Russ (33 Me. 360), 133.
 Blakeman v. Doughty (40 N. J. L. 319), 293.
 Blakey v. Blakey (33 Ala. 611), 20.
 Blanchard v. Blanchard (122 Mass. 558), 218.
 Blanchard v. Lambert (43 Iowa, 228), 435.
 Blanchard v. N. J. Steamboat Co. (59 N. Y. 292), 485.
 Blank v. Livonia Tp. (79 Mich. 1), 380.
 Blanton v. State (Wash., 24 Pac. Rep. 439), 386.
 Blatz v. Rohrbach (116 N. Y. 450; 41 Alb. L. J. 90; 27 N. Y. State Rep. 484), 93.
 Bleachinska v. Howard M. & H. for L. W. (130 N. Y. 497; 42 N. Y. State Rep. 387), 264.
 Blewitt v. Boorum (59 N. Y. Supr. Ct. 321; 39 N. Y. State Rep. 244), 204.
 Bliss v. Cottle (32 Barb. 322), 30.
 Bliss v. Sickles (66 Hun, 633; 50 N. Y. State Rep. 139), 226.
 Bliven v. Lydecker (130 N. Y. 102; 40 N. Y. State Rep. 636), 418.
 Bliven v. New England Screw Co. (23 How. (U. S.) 420), 144.
 Block v. Hicks (27 Ga. 522), 216.
 Blockett v. Lowes (2 M. & Sel. 494), 281.
 Blood v. Fargo & S. Elevator Co. (S. D., 45 N. W. Rep. 200), 158.
 Bloodgood v. Bruen (8 N. Y. 362), 248.
 Blossom v. Griffin (3 Kern. 569), 202.
 Blount v. Kimpton (155 Mass. 378; 31 Am. St. Rep. 554), 54.
 Blow v. Vaughn (105 N. C. 198), 151.
 Blunt v. Barrett (124 N. Y. 117; 35 N. Y. State Rep. 64), 212.
 Blythe v. Sutherland (3 McCord (S. C.), 258), 296.
 Bob v. State (32 Ala. 560), 107.
 Bobb v. Letcher (30 Mo. App. 43), 122, 460.
 Bode v. Trimmer (82 Cal. 513), 122.

The references are to pages.

- Bodine v. Killeen (53 N. Y. 96), 263.
 Boehl v. Chicago, M. & St. P. R. Co. (44 Minn. 191), 426.
 Boehm v. Lies et al. (46 N. Y. State Rep. 26), 151.
 Bohm v. Loewer's Gambrinus Brew. Co. (30 N. Y. State Rep. 424), 244.
 Bohr v. Lambard (53 N. J. L. 233), 422.
 Boise v. Thames & M. M. Ins. Co. (38 Hun, 246), 369.
 Boldt v. Murray (2 N. Y. State Rep. 232), 369.
 Bolling v. State (54 Ark. 586), 386.
 Bollinger v. Gallagher (144 Pa. St. 205), 100.
 Bond v. Fitzpatrick (4 Gray, 89), 335.
 Bonds v. Smith (106 N. C. 553), 208.
 Bone v. State (86 Ga. 108), 135.
 Bonelli, Goods of (L. R. 1 P. D. 69), 360.
 Bonnelli v. Bowen (70 Miss. 142), 225.
 Bonner v. Beard (43 La. Ann. 1036), 238.
 Bonnett v. Devebaugh (3 Bin. (Pa.) 175), 296.
 Booker v Bowles (2 Blackf. 90), 19.
 Boomer v. Koon (6 Hun, 645), 33.
 Boon v. Weathered (23 Tex. 675), 18.
 Boones v. Alexander City (Ala., 7 S. Rep. 437), 135.
 Booth v. Powers (56 N. Y. 22), 31.
 Booth v. Swezey (8 N. Y. 276), 111.
 Boozer v. Teague (27 S. C. 348), 204.
 Bopp v. Askins (31 N. Y. State Rep. 555), 187.
 Borst v. Spelman (4 N. Y. 284), 39.
 Bosley v. Natl. Mach. Co. (123 N. Y. 550; 34 N. Y. State Rep. 277), 89.
 Boston & W. R. Corp. v. Dana (1 Gray, 83, 104), 129.
 Bostwick v. Baltimore, etc. R. Co. (45 N. Y. 712), 31.
 Bottomly v. United States (1 Story Rep. 135), 12.
 Bouker v. Smith (40 Fed. Rep. 839), 424.
 Bounds v. Little (79 Tex. 128), 127.
 Bow v. Allenstown (34 N. H. 351), 241.
 Bowe v. City of Kansas (51 Mo. 454), 88.
 Bowen v. Bowen (3 Bradf. 336), 430.
 Bowen v. Huntington (35 W. Va. 682), 367.
 Bowen v. Natl. Bank of Newport (11 Hun, 226), 130.
 Bowen v. Swander (121 Ind. 164), 460.
 Bowen v. Sweeney (63 Hun, 224; 44 N. Y. State Rep. 182), 78.
 Bowers v. Horan (93 Mich. 420), 475.
 Bowick v. Miller (21 Oreg. 25), 123.
 Bowie v. Maddox (29 Ga. 285), 117.
 Bowels v. Kansas City (51 Mo. App. 416), 222.
 Bowman v. Sanborn (5 Foster, 87, 112), 129.
 Boyce v. Auditor-General (90 Mich. 326), 417.
 Boyd v. Foot (5 Bosw. 110), 452.
 Boyd v. Nebraska (143 U. S. 135), 258.
 Boyd v. United States (142 U. S. 450), 73.
 Boydston v. Sumpter (78 Tex. 402), 407.
 Boyles v. Williams (48 N. Y. State Rep. 651), 394.
 Brackett v. Griswold (128 N. Y. 644), 327.
 Bradhurst v. Field (45 N. Y. State Rep. 748), 254.
 Bradish v. Yocum (130 Ill. 386), 158, 256.
 Bradley v. Mirick (91 N. Y. 295), 314.
 Bradley v. Walker (44 N. Y. State Rep. 213), 437.
 Bradley v. Wheeler (44 N. Y. 500), 169.
 Brady v. Manhattan R. Co. (127 N. Y. 46; 37 N. Y. State Rep. 340), 8, 14.
 Brainard v. Buck (25 Vt. 573), 106.
 Brand v. Johnrouk (60 Mich. 210), 457.
 Brandt v. Klein (17 Johns. 335), 128.
 Brannon v. Adams (76 Ill. 331), 215.
 Brazill v. Isham (12 N. Y. 9), 27.

The references are to pages

- Brembridge v. Osborn (1 Stark. 374), 236.
 Brennan v. Hall (131 N. Y. 160; 39 N. Y. State Rep. 130), 54.
 Brenner v. Atlantic Dredg. Co. (134 N. Y. 156), 87.
 Brett v. First Universal Soc. (63 Barb. 610), 29.
 Bretz v. Mayor, etc. (6 Rob. (N. Y.) 326), 94.
 Brewster v. Davis (56 Tex. 478), 190.
 Brewster v. Hatch (122 N. Y. 349), 245.
 Brewster v. McCall (15 Conn. 294), 256.
 Brice v. Bauer (108 N. Y. 428; 13 N. Y. State Rep. 765), 64.
 Brice v. Miller (35 S. C. 537), 82.
 Brickell v. N. Y. C. & H. R. R. Co. (120 N. Y. 290; 30 N. Y. State Rep. 932), 428.
 Brickhord v. W. U. Tel. Co. (58 Hun, 610; 35 N. Y. State Rep. 589), 425.
 Bridenbecker v. Lowell (32 Barb. 9, 18), 246.
 Bridger v. Asheville & S. R. Co. (25 S. C. 24), 382.
 Bridger v. Asheville & S. R. Co. (27 S. C. 456; 13 Am. State Rep. 653), 165.
 Bridgman v. Corey (62 Vt. 1), 275.
 Briggs' Appeal (93 Pa. St. 485), 452.
 Briggs v. Bowen (60 N. Y. 454), 32.
 Briggs v. Henderson (49 Mo. 531), 308.
 Briggs v. Minneapolis St. R. Co. (Minn., 53 N. W. Rep. 1019), 372.
 Briggs v. N. Y. C. R. Co. (28 Barb. 515), 31.
 Briggs v. Partridge (64 N. Y. 357), 147.
 Briggs v. Vanderbilt (19 Barb. 222), 32.
 Bright v. Young (15 Ala. 112), 133.
 Brindle v. McIlvaine (10 Serg. & Rawle, 232), 17.
 Briston v. Sequeville (6 Ex. 275), 360.
 Broadwell v. Pittsburg & W. R. R. Co. (139 Pa. St. 404), 425.
 Brock v. Milligan (10 Ohio, 121), 68.
 Bromly v. Birmingham M. R. Co. (Ala., 11 S. Rep. 341), 221.
 Bronner v. Frauenthal (37 N. Y. 166), 344.
 Bronner v. Loomis (14 Hun, 341), 402.
 Bronson v. Herbert (95 Mich. 478), 155.
 Bronson v. Winan (8 N. Y. 182), 91.
 Brooklyn St. R. Co. v. Kelly (6 Ohio C. C. 155), 15.
 Brooks v. Ishall (22 Ark. 488), 104.
 Brooks v. Latimer (44 Kan. 431), 189.
 Brooks v. McMeekin (37 Ala. 285), 131.
 Brooks v. Mayor of N. Y. (57 Hun, 104; 32 N. Y. State Rep. 559), 206.
 Brooks v. Rodgers (Ala., 11 S. Rep. 386), 231.
 Brooks v. Townsend (7 Gill, 27), 360.
 Brotherton v. People (75 N. Y. 159), 299.
 Broughton v. McGrew (39 Fed. Rep. 672), 213.
 Brown v. Baldwin & G. Co. (37 N. Y. State Rep. 363), 164.
 Brown v. Brown (16 Vt. 197), 251.
 Brown v. Brown (106 Mo. 611), 179.
 Brown v. Burgett (61 Hun, 623; 40 N. Y. State Rep. 564), 81.
 Brown v. Burnham (28 Me. 38), 439.
 Brown v. Carlyle B. of E. (29 Ill. App. 22), 231.
 Brown v. Commonwealth (73 Pa. St. 321), 314.
 Brown v. Galesburg P. B. & T. Co. (Ill., 24 N. E. Rep. 522), 283.
 Brown v. Isbel (11 Ala. 109), 193.
 Brown v. Jewett (18 N. H. 230), 443.
 Brown v. Kimball (25 Wend. 259), 21.
 Brown v. Massachusetts T. Ins. Co. (151 Mass. 127), 391.
 Brown v. Mitchell (75 Tex. 9), 388.
 Brown v. Payson (6 N. H. 443), 53.
 Brown v. Piper (91 U. S. 37), 102.
 Brown v. Richardson (20 N. Y. 472), 249.
 Brown v. Roberts (75 Tex. 103), 460.

The references are to pages.

- Brown v. Rosedale St. R. Co. (Tex., 15 S. W. Rep. 120), 380.
- Brown v. Schock (77 Pa. St. 471), 437.
- Brown v. Stark (47 Mo. App. 370), 253.
- Brown v. State (55 Ark. 593), 397.
- Brown v. Wiley (20 How. (U. S.) 442), 146.
- Brown v. Wright (Ark., 22 S. W. Rep. 1022), 223.
- Browne v. Murdock (N. Y., 12 Abb. N. C. 360), 374.
- Browne v. Raleigh & G. R. Co. (108 N. C. 34), 426.
- Browne & M. Co. v. Sampson (44 Ill. App. 308), 157.
- Browning v. Goodrich Transp. Co. (78 Wis. 391), 426.
- Browning v. Hanford (5 Denio, 586), 268.
- Bruce v. Dyall (5 Mon. (Ky.) 125), 117.
- Bruce v. Nicolopulo (11 Ex. 133), 129.
- Brunce v. Roulings (7 East, 290), 288.
- Brunner v. American Teleg. & Teleph. Co. (151 Pa. St. 447), 13.
- Brunswick v. Strilka (30 Ill. App. 186), 423.
- Brush v. Wilkins (4 Johns. Ch. (N. Y.) 506, 520), 360.
- Bryan v. Forseyth (19 How. (U. S.) 334), 291.
- Bryan v. Spivey (109 N. C. 57), 395.
- Bryan v. Walter (14 Ga. 485), 21.
- Bryant v. Randolph (133 N. Y. 70; 44 N. Y. State Rep. 85), 382.
- Bubster v. State (33 Neb. 663), 116.
- Buchanan v. Whitman (36 Ind. 257), 99.
- Bucker v. Meyer (43 Fed. Rep. 202), 239.
- Buckman v. Barnum (15 Conn. 63), 104.
- Bucks v. Moore (36 Mo. App. 529), 262.
- Budenfield v. Mass. Mut. Acc. Ass'n (Mass., 20 Ins. L. J. 716), 425.
- Budlong v. Van Nostrand (24 Barb. 25), 21, 109.
- Buehler v. Galt (35 Ill. App. 225), 458.
- Buel v. N. Y. C. R. Co. (31 N. Y. 314), 422.
- Buffalo Loan, T. & S. D. Co. v. Knights Templar & N. M. A. Ass'n (126 N. Y. 450; 38 N. Y. State Rep. 247; 44 Alb. L. J. 47), 56, 114.
- Buffalo, etc. R. Co. v. Corey (26 N. Y. 76), 243.
- Buford v. Lonergan (Utah, 23 Pac. Rep. 164), 152.
- Buford v. Shannon (10 S. Rep. 263), 179.
- Bulger v. Ross (Ala., 12 S. Rep. 803), 235.
- Bull v. Loveland (10 Pick. 9, 14), 128.
- Bullen v. Arnold (31 Me. 583), 125.
- Bullock v. Rouse (81 Cal. 590), 460.
- Bunn v. Third Nat. Bank (38 Ill. App. 76), 452.
- Bunnell v. Butler (23 Conn. 65), 17.
- Bunting v. Salz (84 Cal. 163), 393.
- Burbridge v. Kansas City C. R. Co. (36 Mo. App. 669), 88.
- Burfenning v. Chicago, St. P., M. & O. R. Co. (46 Minn. 20), 90.
- Burghart v. Turner (12 Pick. 534), 122.
- Burhans v. W. U. Tel. Co. (Ind. App., 34 N. E. Rep. 581), 223.
- Burkhart v. Gladish (123 Ind. 337), 406.
- Burkholder v. Fonner (34 Neb. 1), 41.
- Curleigh v. Stott (8 B. & C. 36), 113.
- Burlington, C. R. & M. R. Co. v. Dey (82 Iowa, 312), 95.
- Burlington & M. R. Co. v. White (Neb., 44 N. W. Rep. 95), 481.
- Burney v. Ball (24 Ga. 505), 443.
- Burnham v. Webster (5 Mass. 266), 88.
- Burnes v. Bloedel (42 N. Y. State Rep. 453), 88.
- Burnes v. Rowland (40 Barb. 368), 271.
- Burr et al. v. American S. S. B. Co. (81 N. Y. 178), 178.

The references are to pages.

- Burr v. Broadway Ins. Co. (16 N. Y. 267), 149.
- Burr v. Sickles (17 Ark. 428), 167.
- Burrows v. Butler (38 Hun, 157), 84.
- Burt v. Bush (82 Mich. 506), 407.
- Burton v. Driggs (20 Wall. 125, 134), 129.
- Burton v. Rathbone, S. & Co. (23 Ill. App. 654), 241.
- Bush v. Barnett (96 Cal. 202), 221.
- Buskirk v. Cleveland (41 Barb. 610), 238.
- Butcher v. Brownville (2 Kan. 70), 90.
- Butler v. Howell (Colo., 25 Pac. Rep. 313), 477.
- Butler v. Manhattan R. Co. (52 N. Y. State Rep. 498), 398.
- Butler v. Maples (9 Wall. 766, 778), 129.
- Butler v. Watkins (13 Wall. 457), 12.
- Button v. American Tract Soc. (23 Vt. 350), 256.
- Buttrick v. Allen (8 Mass. 273), 127.
- Butts v. Smartwood (2 Cow. 431), 68.
- Butts v. Village of Lowville (15 N. Y. Week. Dig. 144), 372.
- Byrnes v. Pacific Exp. Co. (Tex., 15 S. W. Rep. 46), 49.
- Byron v. Page (Utah, 23 Pac. Rep. 761), 38.
- C.**
- Cable v. Foley (45 Minn. 421), 452.
- Cable v. McDaniel (33 Mo. 363), 397.
- Cabot v. Given (45 Me. 144), 318.
- Cabot v. Walden (46 Vt. 11), 308.
- Cadman v. Peter (118 U. S. 73), 200.
- Cady v. Sheldon (38 Barb. 103), 238.
- Cake's Appeal (110 Pa. St. 65), 329.
- Calcotte v. Elkins (Tenn., 15 S. W. Rep. 85), 179.
- Caldwell v. Dawson (4 Metc. 121), 170.
- Caldwell v. Murphy (11 N. Y. 416), 331.
- Caldwell v. State (28 Tex. App. 566), 313.
- Calhoun v. McKnight (44 La. Ann. 575), 434.
- California Ins. Co. v. Union Compress Co. (133 U. S. 387), 194.
- Calkins v. Manhattan Oil Co. (65 N. Y. 557), 31.
- Call v. Frith (9 C. & P. 197), 313.
- Callahan v. Show (24 Iowa, 441), 494.
- Caltrane v. Lamb (109 N. C. 209), 135.
- Calvert v. Flower (7 C. & P. 386), 133.
- Camp v. Madison County (91 Ala. 240), 98.
- Campbell v. Commonwealth (84 Pa. St. 187), 505.
- Campbell v. Dearborn (109 Mass. 180, 145), 190, 202.
- Campbell v. State (23 Ala. 44), 72.
- Campbell v. West (86 Cal. 197), 93.
- Campbell v. Woodworth (20 N. Y. 499), 483.
- Canada v. Robbins (55 Hun, 605; 28 N. Y. State Rep. 96), 309.
- Canajoharie Nat. Bank v. Diefendorf (123 N. Y. 191; 42 Alb. L. J. 472; 33 N. Y. State Rep. 389), 81, 513.
- Cancemi v. People (2 Smith, 501), 15.
- Carberry v. Worrell (68 Miss. 573), 478.
- Cardinal v. Hadley (158 Mass. 352), 180.
- Carey v. Britton (4 C. & P. 462), 106.
- Carey v. Carey (104 N. C. 171), 79, 248.
- Carey v. Carey (108 N. C. 267), 54.
- Carnwright v. Gray (127 N. Y. 92), 433.
- Carpenter v. Dame (10 Ind. 125), 134.
- Carpenter v. Dexter (8 Wall. 513), 99.
- Carpenter v. N. Y., N. H. & H. R. R. Co. (124 N. Y. 53; 34 N. Y. State Rep. 857), 222.
- Carpenter v. Scott (Iowa, 53 N. W. Rep. 328), 209.
- Carr v. Dooley (119 Mass. 294), 199.
- Carradine v. Hotchkiss (120 N. Y. 608; 31 N. Y. State Rep. 951), 134.
- Carraher v. Mullighan (54 Hun, 638; 28 N. Y. State Rep. 439), 188.

The references are to pages.

- Carrell v. Peake (2 Stark. 129), 121.
 Carrie v. Cummings (26 Ga. 690), 351.
 Carrington v. Crocker (37 N. Y. 336), 218.
 Carroll v. Davis (9 Abb. N. C. 60), 85.
 Carroll v. State (23 Ala. 28), 115.
 Carroll v. Tucker (50 N. Y. State Rep. 611), 109.
 Carson v. Central R. Co. (35 Cal. 325), 450.
 Carson v. Lineberger (70 N. C. 173), 453.
 Carter v. Boehm (28 Vict., ch. 18, § 18), 360.
 Carter v. Carter (37 Ill. App. 209), 408.
 Carter v. N. Y. El. R. Co. (134 N. Y. 168; 28 N. Y. State Rep. 581), 481.
 Carthaus v. State (78 Wis. 560), 395.
 Cartier v. Troy Lumber Co. (138 Ill. 533), 438.
 Cartledge v. West (2 Denio, 377), 218.
 Carty v. Connelly (91 Cal. 15), 179.
 Case v. Gorton (80 Mich. 139), 205.
 Case v. Kelly (133 U. S. 21), 88, 91.
 Case v. Mobile (30 Ala. 538), 91.
 Case v. Phoenix Bridge Co. (134 N. Y. 78; 45 N. Y. State Rep. 603), 182.
 Case Mfg. Co. v. Saxman (138 U. S. 431), 178.
 Cassidy v. Fontham (38 N. Y. State Rep. 177), 150, 403.
 Castle v. Bullard (7 Wall. 132), 12.
 Casto v. Fry (33 W. Va. 449), 335.
 Castrique v. Imrie (L. R. 4 E. & J. App. 424), 360.
 Catlin v. Tobias (26 N. Y. 217), 36.
 Caujolle v. Ferrie (23 N. Y. 90-94), 436.
 Caujolle v. Ferrie (26 Barb. 177), 260.
 Ceary v. Meagher (33 Ala. 630), 197.
 Central M. Tr. Co. v. Rockafellow (17 Ill. 541), 68.
 Central R. & Banking Co. v. Skillie (90 Ga. 12), 329.
 Central R. Co. v. Smith (74 Md. 212), 425.
 Central Savings Bank v. Baltimore (71 Md. 515), 88.
 Chadbourne v. Williams (45 Minn. 294), 418.
 Chadwick v. Fonner et al. (69 N. Y. 404), 384.
 Chaffee v. Mackenzie (43 La. Ann. 1064), 64.
 Chagary v. Jenkins (5 N. Y. 376), 267.
 Chamberlain v. Dunlop (54 Hun, 639; 126 N. Y. 45; 28 N. Y. State Rep. 375), 380.
 Chamberlain v. Huguenot Manuf. Co. (118 Mass. 532), 242.
 Chamberlain v. Rodgers (79 Mich. 219), 477.
 Champlin v. Butler (18 Johns. 169), 193.
 Champney v. Coope (22 N. Y. 543), 107.
 Chancellor v. Donnell (Ala., 10 S. Rep. 910), 441.
 Chandler v. Le Barron (45 Me. 534), 402.
 Chandler v. Jamaica Pond Aqueduct Corp. (122 Mass. 305), 486.
 Chandler v. Jost (Ala., 11 S. Rep. 636), 235.
 Chaney v. Home F. & F. M. Soc. (28 Ill. App. 21), 355.
 Chanoine v. Fowler (3 Wend. 173), 92.
 Chapin v. Baker (124 Ind. 385), 187.
 Chapin v. Chicago, M. & St. P. R. Co. (79 Iowa, 582), 426.
 Chapin v. Dobson (78 N. Y. 74), 183.
 Chapin v. Lapham (20 Pick. 467), 310.
 Chapin v. Pratt (66 Hun, 628; 49 N. Y. State Rep. 42), 232.
 Chapman v. Chapman (2 Conn. 347), 285.
 Chapman v. Rose (56 N. Y. 137), 509.
 Chapman v. Wilbor (6 Hill, 475), 95.
 Charles v. Huber (78 Pa. St. 448), 253.
 Charleston v. Ashley Phosphate Co. (34 U. S. 541), 88.
 Charlotte v. Chouteau (33 Mo. 194), 360.

The references are to pages.

- Charter v. Otis (41 Barb. 525), 256.
 Chase v. Everts (65 Hun. 631; 47 N. Y. State Rep. 425), 186.
 Chase v. Sycamore, etc. R. Co. (38 Ill. 215), 317.
 Chateaugay Ore. & I. Co. v. Blake (144 U. S. 476), 305.
 Chattanooga R. etc. R. Co. v. Jackson (86 Ga. 676), 393.
 Chattanooga R. etc. R. Co. v. Owens (90 Ga. 265), 222.
 Chattanooga R. etc. R. Co. v. Whitehead (90 Ga. 47), 221.
 Cheapside Bank v. Swain (29 Md. 483), 168.
 Chellis v. Cleafman (125 N. Y. 214; 35 N. Y. State Rep. 20), 490.
 Chelmsford Co. v. Demarest (7 Gray, 1), 110.
 Chemical Elec. Light & P. Co. v. Howard (150 Mass. 495), 188.
 Cheney v. Arnold (15 N. Y. 351), 260.
 Cheney v. Dunlop (27 Neb. 401), 369.
 Cheney v. Goodrich (106 Mass. 566), 168.
 Chesbro v. Powers (78 Mich. 472), 351.
 Chess v. Chess (1 Pa. St. 32), 17.
 Chester v. Bank of Kingston (16 N. Y. 336), 200.
 Chester v. Dickerson (54 N. Y. 1), 270.
 Chicago & A. R. Co. v. Dillon (24 Ill. App. 203; 123 Ill. 570), 363.
 Chicago & A. R. Co. v. Legg (32 Ill. App. 218), 405.
 Chicago & A. R. Co. v. O'Brien (35 Ill. App. 155), 383.
 Chicago, B. & Q. R. Co. v. Johnson (36 Ill. App. 564), 315.
 Chicago, B. & Q. R. Co. v. Schoffer (124 Ill. 112), 478.
 Chicago City R. Co. v. Engle (35 Ill. App. 490), 424.
 Chicago City R. Co. v. Van Vleck (143 Ill. 480), 399.
 Chicago, K. & W. R. Co. v. Cosper (42 Kan. 561), 481.
 Chicago, K. & W. R. Co. v. Muller (45 Kan. 85), 480.
 Chicago, M. & St. P. R. Co. v. McArthur (53 Fed. Rep. 464), 282.
 Chicago, M. & St. P. R. Co. v. O'Sullivan (143 Ill. 48), 166.
 Chicago, P. & St. L. R. Co. v. Nix (137 Ill. 141), 480.
 Chicago, St. L. & P. R. Co. v. Ashling (34 Ill. App. 99), 328.
 Chicago, St. L. & P. R. Co. v. Spilker (Ind., 32 Am. L. Reg. 763), 331.
 Chicago, St. P., M. & O. R. Co. v. Gilbert (52 Fed. Rep. 711), 130.
 Chickering v. Brooks (61 Vt. 554), 64, 386.
 Chipman v. Peabody (Mass., 34 N. E. Rep. 563), 89.
 Chirac v. Reinecker (11 Wheat. 280), 50.
 Choat v. Huff (Tex. App., 18 S. W. Rep. 87), 83.
 Chopin v. Badger Paper Co. (83 Wis. 193), 221.
 Christ v. Dittenbach (1 Serg. & Rawle, 464), 146.
 Christensen v. Union Trunk Line (Wash., 32 Pac. Rep. 1018), 222.
 Christian v. Columbus & K. R. Co. (90 Ga. 124), 487.
 Christie v. The Craighton (41 Fed. Rep. 64), 426.
 Chrysler v. Renois (43 N. Y. 212), 130.
 Church v. Hubbart (2 Cranch, 187, 237), 87, 127, 360.
 Cicotte v. St. Anne's Church (60 Mich. 552), 164.
 Cincinnati, W. & B. R. Co. v. Hoffhines (46 Ohio St. 646), 92.
 City Council of Montgomery v. M. & W. Plank Road Co. (31 Ala. 79), 90.
 City of Ripon v. Bittel (30 Wis. 614), 360.
 Claffy v. Farron (44 N. Y. State Rep. 789), 433.
 Clafin v. Pfeffer (76 Tex. 469), 419.

The references are to pages.

- Clair v. Chicago, B. & Q. R. Co.
 (Iowa, 45 N. W. Rep. 470), 95.
 Clancy v. Losey (65 Hun, 625; 48 N.
 Y. State Rep. 191), 371.
 Clapp v. Fullerton (34 N. Y. 190), 373.
 Clapp v. Rogers (12 N. Y. 283), 274.
 Clark v. Baird (9 N. Y. 183), 483.
 Clark v. Clark (76 Wis. 306), 419.
 Clark v. Commonwealth (29 Pa. St.
 129), 88.
 Clark v. Cummings (5 Barb. 339), 444.
 Clark v. Dales (20 Barb. 42), 37.
 Clark v. Draper (19 N. H. 418), 459.
 Clark v. Fletcher (1 Allen, 53), 134.
 Clark v. Fry (121 N. Y. 470; 31 N. Y.
 State Rep. 424), 238.
 Clark v. Gilbert (39 Conn. 94), 263.
 Clark v. Jones (87 Ala. 474), 241.
 Clark v. Kirschner (113 Mo. 290), 235.
 Clark v. Marshall (62 N. H. 498), 390.
 Clark v. Montgomery (23 Barb. 464),
 111.
 Clark v. Owen (18 N. Y. 434), 293.
 Clark v. Ryan (Ala., 11 S. Rep. 22),
 410.
 Clark v. State (28 Tex. App. 189), 350.
 Clark v. Tryon (53 N. Y. State Rep.
 123), 26.
 Clark v. Vorce (15 Wend. 193), 314.
 Clark v. Wood (34 N. H. 447), 293.
 Clary v. Clary (2 Ired. 78), 359.
 Claxton v. Dave (10 B. & C. 17), 282.
 Clay v. Field (138 U. S. 464), 149, 254.
 Clayton v. Nugent (13 Mees. & W.
 200, 207), 253.
 Clayton v. State (88 Ga. 627), 205.
 Clayton v. Wardwell (4 N. Y. 231), 260.
 Clearwater v. Brill (63 N. Y. 627), 267.
 Clements v. Landman (26 Ga. 401),
 434.
 Clements v. Moore (6 Wall. 299), 212.
 Clenighan v. McFarland (34 N. Y.
 State Rep. 624), 175.
 Clerihen v. West State Bank (Minn.,
 52 N. W. Rep. 967), 209.
 Cleveland v. Haey (18 Ala. 343), 314.
 Cleveland, C. C. & I. R. Co. v. Clos-
 ser (126 Ind. 348), 10, 28.
 Cleveland, C. C. & St. L. R. Co. v. Prew-
 itt (Ind., 33 N. E. Rep. 267), 331.
 Cleveland, etc. R. Co. v. Mara (26
 Ohio St. 185), 345.
 Clews v. Kehr (90 N. Y. 633), 104.
 Clothier v. Chapman (14 East, 331),
 281.
 Cloud v. Clinkinbeard (48 Am. Dec.
 397), 451.
 Cloud v. Whiting (38 Ala. 57), 416.
 Clough v. Kyne (40 Ill. App. 234), 438.
 Cluff v. Mut. Ben. L. Ins. Co. (13
 Allen, 308), 456.
 Cluffy v. Insurance Co. (99 Mass. 317),
 510.
 Coapstick v. Bosworth (121 Ind. 6),
 188.
 Coats v. Boston & M. R. Co. (153 Mass.
 297), 165.
 Cobb v. West (4 Duer, 38), 34.
 Cochran v. State (28 Tex. App. 422),
 392.
 Coffee v. State (25 Fla. 501), 116.
 Coffey v. Lyons (32 N. Y. State Rep.
 66), 137.
 Coffin v. Carnahan (127 Ind. 427), 131.
 Coffins v. Collins (17 Me. 440), 318.
 Cogshell v. Pittsburgh Rolling Mill
 Co. (48 Kan. 480), 419.
 Coison v. Berson (86 Cal. 433), 127.
 Coit v. Commercial Ins. Co. (7 Johns.
 385), 172.
 Coit v. Mulliken (1 Denio, 376), 87.
 Cokely v. State (4 Iowa, 477), 20.
 Cole v. Butler (24 Mo. App. 76), 271.
 Cole v. Gardner (67 Miss. 670), 77,
 249.
 Cole v. Lake Shore & M. S. R. Co.
 (81 Mich. 156), 351.
 Cole v. Lake Shore & M. S. R. Co. (95
 Mich. 77), 351.
 Cole v. Segraves (88 Cal. 103), 98.
 Coleman v. First Nat. Bank (53 N. Y.
 388), 240.
 Colglazier v. Colglazier (124 Ind. 196),
 10.
 Collinder v. Dinsmore (55 N. Y. 200),
 156.

The references are to pages.

- Collins v. Baynton (1 Q. B. 118), 121.
 Collins v. Gilbert (94 U. S. 757), 33.
 Collins v. Grantham (12 Md. 440), 287.
 Collins v. Stevens (5 Gray, 438), 21.
 Collins v. Valleau (79 Iowa, 631), 429.
 Colorado Midland R. Co. v. O'Brien
 (16 Colo. 219), 383.
 Colt v. Cone (107 Mass. 285), 217.
 Colt v. People (1 Park. Crim. Rep.
 611), 18.
 Colton v. Jones (7 Robt. 164), 29.
 Commercial Bank of Pennsylvania
 v. Union Bank (19 Barb. 392), 168.
 Commissioners of Pilots v. Vander-
 bilt (31 N. Y. 265), 216.
 Commonro v. Bakeman (105 Mass.
 56), 243.
 Com. v. Blood (97 Mass. 538), 421.
 Com. v. Boynton (2 Allen, 160), 416.
 Com. v. Brothers (158 Mass. 200), 501.
 Com. v. Bucciare (153 Pa. St. 535), 388.
 Com. v. Casey (11 Cush. 417), 297.
 Com. v. Cloonen (151 Pa. St. 605), 9.
 Com. v. Connors (156 Pa. St. 147), 141.
 Com. v. Cremeans (13 S. W. Rep. 884),
 354.
 Com. v. Dearborn (109 Mass. 368), 217.
 Com. v. Doughty (139 Pa. St. 383),
 315.
 Com. v. Drake (15 Mass. 161), 115.
 Com. v. Drum (58 Pa. St. 9), 448.
 Com. v. Emery (2 Gray, 80), 132.
 Com. v. Emmons (98 Mass. 6), 416.
 Com. v. Gould (154 Mass. 499), 406.
 Com. v. Griffin (110 Mass. 181), 63.
 Com. v. Hacket (2 Allen, 136), 324.
 Com. v. Halstine (132 Pa. St. 337), 231.
 Com. v. Hanlon (3 Brewster, 461), 115.
 Com. v. Hardy (2 Mass. 317), 16.
 Com. v. Hill (11 Cush. 137), 60.
 Com. v. Holmes (157 Mass. 233), 505.
 Com. v. Howe (2 Allen, 153), 115.
 Com. v. Howe (9 Gray, 110), 115.
 Com. v. Hurley (158 Mass. 159), 501.
 Com. v. Ingraham (7 Gray, 46), 19.
 Com. v. King (150 Mass. 221), 98.
 Com. v. Knapp (9 Pick. 496), 115.
 Com. v. McCarty (152 Mass. 577), 315.
 Com. v. McMahon (145 Pa. St. 413),
 469.
 Com. v. McPike (3 Cush. 181), 324.
 Com. v. Marrian (14 Pick. 418), 19.
 Com. v. Matthews (Ky., 12 S. W. Rep.
 333), 298.
 Com. v. Mead (10 Allen, 398), 450.
 Com. v. Meserve (154 Mass. 284), 351.
 Com. v. Moore (2 Dana, 402), 17.
 Com. v. Moore (157 Mass. 324), 350.
 Com. v. Morgan (34 N. E. Rep. 458),
 141.
 Com. v. Mosler (4 Pa. St. 264), 115.
 Com. v. Mullen (150 Mass. 394), 342.
 Com. v. Munsey (112 Mass. 289), 265.
 Com. v. Pendergast (138 Pa. St. 633),
 119.
 Com. v. Raymond (97 Mass. 567), 415.
 Com. v. Robinson (1 Gray, 555), 75.
 Com. v. Robinson (Thacker's Crim.
 Cas. 236), 16.
 Com. v. Sackett (22 Pick. 394), 16.
 Com. v. Sapp (90 Ky. 580), 74.
 Com. v. Smith (153 Mass. 97), 136, 348.
 Com. v. Spink (137 Pa. St. 255), 74.
 Com. v. Straesser (153 Pa. St. 451),
 505.
 Com. v. Strong (53 Pa. St. 132), 260.
 Com. v. Stocker (109 Mass. 365), 216.
 Com. v. Sturtevant (117 Mass. 122),
 359.
 Com. v. Tibbets (157 Mass. 519), 139.
 Com. v. Timothy (8 Gray, 480), 216.
 Com. v. Trefethan (157 Mass. 180), 13,
 326.
 Com. v. Vass (3 Leigh (Va.), 786), 299.
 Com. v. Walker (13 Allen, 570), 107.
 Com. v. Webster (5 Cush. 295), 16.
 Com. v. Wentworth (118 Mass. 470),
 415.
 Com. v. Willard (22 Pick. 476), 505.
 Com. Title Ins. & T. Co. v. Gray (150
 Pa. St. 255), 297.
 Conable v. Keeney (61 Hun, 624; 40
 N. Y. State Rep. 939), 457.
 Conally v. Parden (1 Paige, 291), 255.
 Conant v. Riseborough (139 Ill. 383),
 205.

The references are to pages.

- Concord R. Co. v. Greeley (23 N. H. 237, 242), 368, 483.
 Condit v. Cowdrey (123 N. Y. 463; 54 N. Y. State Rep. 107), 175.
 Cone v. Dunham (59 Conn. 145), 259.
 Cone v. Purcell (56 N. Y. 649), 240.
 Conestoga Cigar Co. v. Finke (144 Pa. St. 159), 407.
 Congden v. Winsom (17 R. I. 236), 317.
 Conklin v. Gandall (1 Abb. Ct. App. Dec. 423), 33.
 Conlin v. Masecar (80 Mich. 139), 207.
 Connecticut River Sav. Bank v. Mabee (64 Vt. 571), 302.
 Connell v. Wilds (Mass., 26 N. E. Rep. 1114), 127.
 Connelly v. Manhattan R. Co. (60 Hun, 495), 576.
 Connelly v. O'Connor (117 N. Y. 91), 79.
 Conner v. Reese (105 N. Y. 643), 25.
 Conrod v. Fisher (37 Mo. App. 352), 167.
 Conrod v. Griffey (16 How. (U. S.) 38), 21.
 Consolidated Ice Machine Co. v. Kiefer (134 Ill. 481), 11.
 Constable v. Lefever (66 Hun, 628; 49 N. Y. State Rep. 294), 487.
 Continental Ins. Co. v. Insurance Co. of Pa. (51 Fed. Rep. 884), 226.
 Continental Life Ins. Co. v. Schwenck (94 U. S. 593), 318.
 Conwell v. Watkins (71 Ill. 489), 417.
 Cook v. Bass (44 N. Y. 156), 106.
 Cook v. Brown (3 N. H. 460), 21.
 Cook v. Caswell (81 Tex. 678), 446.
 Cook v. Hunt (24 Ill. 535), 22.
 Cook v. Long Island R. Co. (65 Hun, 619; 47 N. Y. State Rep. 200), 501.
 Cook v. Patterson (35 Ala. 102), 459.
 Cook v. Standard L. & Acc. Ins. Co. (84 Mich. 12), 405.
 Cooledge v. Ruggles (15 Mass. 387), 433.
 Cooley v. Com. (Ky., 12 S. W. Rep. 132), 351.
 Cooley v. Foltz (85 Mich. 47), 56.
 Coonrod v. Madden (126 Ind. 197), 199.
 Cooper v. Dedrich (22 Barb. 516), 440.
 Cooper v. Georgia P. R. Co. (92 Ala. 329), 426.
 Cooper v. Granberry (33 Miss. 117), 133.
 Cooper v. Kane (19 Wend. 386), 173.
 Cooper v. Moore (44 Miss. 386), 428.
 Cooper v. Standley (40 Mo. App. 138), 455.
 Cooper v. Wood (1 Colo. App. 101), 104.
 Copp v. Harris (32 Mo. App. 588), 10.
 Corbett v. St. L., I. M. & S. R. Co. (26 Mo. App. 621, 641), 56, 323.
 Corker v. Corker (87 Cal. 643), 161.
 Corker v. Corker (95 Cal. 308), 390.
 Corn v. Rosenthal (48 N. Y. State Rep. 674), 205.
 Cornelius v. Com. (15 B. Mon. 539), 21.
 Cornelius v. Hambay (150 Pa. St. 359), 74.
 Cornelius v. Risser (44 N. Y. State Rep. 491), 264.
 Cornell v. Cook (7 Cow. 310, 313), 117.
 Cornell v. Dakin (38 N. Y. 253), 28.
 Cornell v. Markham (19 Hun, 275), 488.
 Cornett v. Fain (33 Ga. 219), 336.
 Cornett v. Williams (20 Wall. 226, 246), 129.
 Corning v. Ashley (4 Denio, 354), 306.
 Corning v. Corning (6 N. Y. 100), 6.
 Cornish v. Farm Build. F. Ins. Co. (74 N. Y. 298), 399.
 Cornish v. Graff (36 Hun, 160), 488.
 Corser v. Paul (41 N. H. 24), 105.
 Corson v. Berson (86 Cal. 433), 192.
 Cory v. Bretton (4 C. & P. 462), 64.
 Cospers v. Nesbit (45 Kan. 457), 150.
 Coster v. Babington (2 Watts & Serg. 505), 493.
 Coster v. Coal Co. (77 Pa. St. 286), 172.
 Coster v. Kansas City Cable Co. (42 Fed. Rep. 37), 424.

The references are to pages.

- Costigan v. Gould (5 Denio, 290), 434.
 Costigan v. Mohawk & H. R. R. Co.
 (2 Denio, 609), 211.
 Cosulich et al. v. Standard Oil Co.
 (122 N. Y. 118; 33 N. Y. State
 Rep. 287), 219.
 Cotrell v. Com. (13 Ky. L. Rep. 305),
 276, 374.
 Cotton v. State (87 Ala. 75), 54.
 Coughran v. Gilman (81 Iowa, 442),
 88.
 Coulam v. Doull (133 U. S. 216), 355.
 Coulter v. Stafford (48 Fed. Rep. 266),
 99.
 Counselman v. Collins (35 Ill. App.
 68), 131.
 Cousins v. Jackson (52 Ala. 265), 249.
 Cover v. Mayors (23 Ark. 850), 432.
 Cover v. Myers (74 Md. 406), 15.
 Covert v. Gray (34 How. Pr. 450),
 440.
 Cowder v. Reynolds (12 Serg. & Rawle,
 281), 19.
 Cowert v. Williams (34 Ga. 167), 250.
 Cowing v. Altman (79 N. Y. 167), 25.
 Cowles v. Reavis (109 N. C. 417), 417.
 Cowley v. Colwell (91 Mich. 537), 382.
 Cowman v. Rogers (73 Mich. 403),
 446.
 Cox v. Paterson (80 Ala. 608), 192.
 Cox v. Seynite Granite Co. (39 Mo.
 App. 424), 89.
 Cox v. State (28 Tex. App. 92), 313.
 Cox v. Ward (107 N. C. 507), 120.
 Coye v. Dodd (13 Metc. 33), 200.
 Coye v. Leach (8 Metc. 371), 447.
 Crabtree v. Atchinson (13 Ky. L. Rep.
 321), 432.
 Crabtree v. Rile (21 Ill. 180), 18.
 Craig v. Adair (22 Ga. 373), 268.
 Grain v. Huntington (81 Tex. 614),
 135.
 Crain v. Wright (46 Ill. 104), 263.
 Cramer v. Shriner (18 Md. 147), 144.
 Crary v. Sprague (12 Wend. 41), 313.
 Crawford v. Kindbrough (76 Ga. 299),
 460.
 Crawford v. Lorper (25 Barb. 449), 295.
 Crawfordsville v. Braden (130 Ind.
 149), 93.
 Craycroft v. Walker (26 Mo. App.
 419), 213.
 Crease v. Barrett (1 C., M. & R. 919),
 280.
 Creery v. Holly (14 Wend. 26), 172.
 Crenshaw v. Bradley (52 Ark. 318),
 230.
 Crickton v. Smith (34 Md. 42), 128.
 Criddle v. Criddle (21 Mo. 522), 111.
 Crim v. Fleming (123 Ind. 438), 315.
 Crim v. Handley (94 U. S. 652), 32.
 Crockett v. Althouse (35 Mo. App.
 404), 276.
 Croft v. White (36 Miss. 455), 457.
 Crogan v. Carelton (21 Me. 493), 108.
 Cromer v. Pickney (3 Barb. Ch. 466),
 254.
 Crompton v. Pratt (105 Mass. 255),
 453.
 Cromwell v. County of Sac (94 U. S.
 351), 506.
 Cronk v. Chicago, M. & St. P. R. Co.
 (S. D., 54 Am. & Eng. R. Cas. 525),
 428.
 Cronk v. Frith (9 C. & P. 197), 121.
 Crook v. Baraboo First Nat. Bank (83
 Wis. 31; 46 Alb. L. J. 387), 206.
 Crooks v. Bunn (136 Pa. St. 368), 323.
 Cropp v. Cropp (88 Va. 753), 441.
 Crosby v. The D. & H. C. Co. (128 N.
 Y. 641; 40 N. Y. State Rep. 85),
 176.
 Crosby v. People (137 Ill. 325), 351.
 Crosland v. Mut. Sav. Fund (121 Pa.
 St. 65), 353.
 Cross v. Cross (3 Paige, 139), 261.
 Cross v. Hollister (47 Kan. 652), 189.
 Crossley v. Dixon (10 H. L. C. 293),
 510.
 Crossman v. Fuller (17 Pick. 171), 202.
 Crothers v. Crothers (149 Pa. St. 201),
 248.
 Crotty v. Union Mut. L. Ins. Co. (144
 U. S. 621), 439.
 Croudson v. Leonard (4 Cranch, 435),
 91.

The references are to pages.

- | | |
|---|--|
| <p>Crow v. Conant (90 Mich. 247; 30 Am. St. Rep. 427), 432.</p> <p>Crow v. Jordan (49 Ohio St. 655), 139.</p> <p>Crowder v. Hopkins (10 Paige, 183), 293.</p> <p>Crowell v. Kirk (3 Dev. 355), 19.</p> <p>Crumes v. State (28 Tex. App. 516), 406.</p> <p>Crump v. Commonwealth (14 Ky. L. Rep. 450), 21.</p> <p>Cubbison v. McCurry (2 Watts & Serg. 262), 68.</p> <p>Cuck v. Quackenbush (13 Hun, 107), 264.</p> <p>Cuddy v. Brown (78 Ill. 415), 284.</p> <p>Culbertson & Blair Pack. Co. v. City of Chicago (111 Ill. 651), 483.</p> <p>Culver v. Marks (122 Ind. 554), 448.</p> <p>Culver v. Scott & W. Lumber Co. (Minn., 55 N. W. Rep. 552), 309.</p> <p>Culver v. Uthe (133 U. S. 655), 136.</p> <p>Culver v. Wilkinson (145 U. S. 205), 187.</p> <p>Cumberland & P. R. Co. v. State (73 Md. 74), 411.</p> <p>Cummings v. Boss (90 Cal. 68), 176.</p> <p>Cummings v. McKinney (5 Ill. 57), 133.</p> <p>Cummings v. Morris (25 N. Y. 625), 238.</p> <p>Cummings v. Putnam (19 N. H. 969), 196.</p> <p>Cummings v. The Barracouta (40 Fed. Rep. 498), 426.</p> <p>Cunningham v. Fuller (35 Neb. 58), 352.</p> <p>Cunningham v. Martin (46 Kan. 352), 203.</p> <p>Cunningham v. Massena Springs & T. C. R. Co. (63 Hun, 439; 44 N. Y. State Rep. 723), 244.</p> <p>Cunningham v. N. Y. C. & H. R. R. Co. (49 Fed. Rep. 439), 395.</p> <p>Cunningham v. Parks (97 Mass. 172), 346.</p> <p>Curtiss v. Belknap (21 Vt. 433), 122.</p> <p>Curtiss v. Fay (37 Barb. 64), 39, 266.</p> <p>Curtiss v. Moore (26 Md. 93), 345.</p> | <p>Curtiss v. Soltan (34 N. Y. State Rep. 767), 175.</p> <p>Curtiss v. Strong (4 Day's Cases, 51), 68.</p> <p>Cushman v. United States Ins. Co. (70 N. Y. 72), 511.</p> <p>Cutler v. State (36 N. J. L. 125), 416.</p> <p>Cutler v. Wright (22 N. Y. 472), 30, 99.</p> <p>Cuyler v. McCartney (40 N. Y. 221), 336.</p> |
|---|--|
- D.**
- | | |
|---|--|
| <p>Daggett v. Colgan (92 Cal. 53), 100.</p> <p>Daggett v. Shaw (5 Metc. 223), 104.</p> <p>Dailey v. State (10 Ind. 536), 87.</p> <p>Daja v. Mays (1 Wm. Saund. 276), 95.</p> <p>Dalder v. Huntingfield (11 Ves. 292), 90.</p> <p>Dale v. Roosevelt (1 Paige, 35), 250.</p> <p>Dale v. Wilson (16 Minn. 525), 100.</p> <p>Daley v. American Print. Co. (152 Mass. 581), 165.</p> <p>Daly v. Chicago, M. & St. P. R. Co. (Minn., 45 N. W. Rep. 611), 424.</p> <p>Dan v. Brown (4 Cow. 483), 104, 113.</p> <p>Dana v. Conant (30 Vt. 246), 130.</p> <p>Dana v. Fiedler (12 N. Y. 40), 184.</p> <p>Dana v. Taylor (150 Mass. 25), 174.</p> <p>Danby v. Danby (5 Jur. (N. S.) 54), 445.</p> <p>Daniels v. Johnson (29 Ga. 207), 199, 237.</p> <p>Daniels v. Smith (130 N. Y. 696; 28 N. Y. State Rep. 351), 136.</p> <p>Danthitt v. Stinson (63 Mo. 268), 95.</p> <p>Darby v. Roberts (Tex., 22 S. W. Rep. 529), 64.</p> <p>Darrell v. Johnson (Neb., 53 N. W. Rep. 890), 425.</p> <p>Darwin v. Keigher (45 Minn. 64), 80.</p> <p>Dave v. State (37 Ark. 262), 450.</p> <p>Davenport v. Hannibal (110 Mo. 574), 58.</p> <p>Davey v. Lohrman (39 N. Y. State Rep. 207), 64.</p> <p>Davidson v. Cornell (132 N. Y. 228; 31 N. Y. State Rep. 982), 331.</p> | |
|---|--|

The references are to pages.

- Davidson v. Cornell (132 N. Y. 228; 43 N. Y. State Rep. 887), 383.
- Davidson v. Gardner (10 N. J. L. 289), 508.
- Davis' Appeal (38 Md. 15), 360.
- Davis v. Brown (94 U. S. 423), 508.
- Davis v. Carpenter (12 How. Pr. 287), 33.
- Davis v. Chicago, R. I. & P. R. Co. (83 Iowa, 744), 455.
- Davis v. Davis (108 N. C. 501), 207.
- Davis v. Ely (104 N. C. 16), 207.
- Davis v. Fuller (12 Vt. 178), 280.
- Davis v. Gallagher (55 Hun, 593; 29 N. Y. State Rep. 882), 330.
- Davis v. Gallagher (124 N. Y. 487; 36 N. Y. State Rep. 461), 113, 248.
- Davis v. Garrett (91 Tenn. 147), 451.
- Davis v. Green (102 Mo. 170), 3, 35.
- Davis v. Hopkins (18 Colo. 153), 205.
- Davis v. Moody (15 Ga. 175), 193.
- Davis v. N. Y., L. E. & W. R. Co. (52 N. Y. State Rep. 740), 385.
- Davis v. Sawyer (N. H., 20 Atl. Rep. 100), 206.
- Davis v. Seaman (64 Hun, 572; 46 N. Y. State Rep. 810), 82.
- Davis v. Shedd (15 Mass. 6), 141.
- Davis v. State (17 Ala. 354), 420.
- Davis v. Stout (126 Ind. 12), 142.
- Davis v. Sweeney (Iowa, 45 N. W. Rep. 1040), 329.
- Davis v. Zimmerman (40 Mich. 20), 346.
- Dawson v. Callaway (18 Ga. 373), 269.
- Dawson v. Hall (2 Mich. 390), 75.
- Dawson v. Kittle (4 Hill, 107), 169.
- Dawson v. Wells (22 N. Y. Week. Dig. 81), 369.
- Day v. Hammond (57 N. Y. Week. Dig. 484), 32.
- Deakins v. Hollis, Adm'r (7 G. & J. 311), 143.
- Dean v. Berder (15 Tex. 298), 128.
- Dean v. Gridly (10 Wend. 254), 267.
- Dean v. Wilkenson (126 Ind. 338), 335.
- Deane Steam Pump Co. v. Green (31 Mo. App. 269), 328.
- Dearmond v. Dearmond (12 Ind. 455), 30.
- De Camp v. McIntire (115 N. Y. 258; 26 N. Y. State Rep. 266), 152.
- De Coument v. Morgan (5 N. Y. State Rep. 541), 501.
- Deering v. Creighton (Oreg., 24 Pac. Rep. 198), 194.
- Deering v. Flanders (49 N. H. 225), 274.
- De Jarnett v. Harper (45 Mo. App. 415), 259.
- De Jarnett v. McDaniel (93 Ala. 215), 562.
- Delafield v. Hand (3 Johns. 310), 127.
- De Lavallette v. Wendt (75 N. Y. 579; 31 Am. Rep. 494), 202.
- De Loach v. Smith (83 Ga. 665), 187.
- De Lora v. Philipps (10 H. L. 624), 503.
- Demings v. Supreme Lodge K. of P. (60 Hun, 350; 38 N. Y. State Rep. 979), 316.
- Demings v. Supreme Lodge K. of P. (131 N. Y. 522; 43 N. Y. State Rep. 872), 230.
- Dempsey v. Kipps (61 N. Y. 462), 240.
- Den v. Gaston (25 N. J. L. 615), 460.
- Denfield v. Smith (Mass., 30 N. E. Rep. 1018), 252.
- Denise v. Denise (41 Hun, 9; 18 N. Y. State Rep. 876), 84.
- Denise v. Denise (110 N. Y. 562; 18 N. Y. State Rep. 873), 498.
- Denman v. Campbell (7 Hun, 88), 371.
- Dennett v. Dow (117 Me. 19), 19.
- Dennis v. Coman (61 N. Y. 642), 37.
- Dennison v. Taylor (Ill., 31 N. E. Rep. 148), 421.
- Denny v. Denny (123 Ind. 240), 419.
- Denser v. Hamilton (52 Mo. App. 394), 186.
- Denser v. Walkup (43 Mo. App. 625), 52.
- Dent v. Pickens (34 W. Va. 240), 11.
- Denton v. Peters (L. R. 5 Q. B. 474), 202.
- Denver, T. & G. R. Co. v. De Graff (2 Colo. App. 42), 65.

The references are to pages.

- Denver, T. & G. R. Co. v. Griffith (17 Colo. 598), 482.
- Depruttron v. Young (134 U. S. 241), 214.
- De Reo (L. R. 3 C. P. 286), 455.
- Dermott v. Jones (2 Wall. 9), 34.
- Deserber v. Harrington (28 Mo. App. 632), 353.
- De Soucey v. Manhattan R. Co. (39 N. Y. State Rep. 79), 329.
- Despard v. Walbridge (15 N. Y. 374), 190.
- De Treest v. Bloomingdale (5 Denio, 304), 453.
- Destrehan v. Louisiana Cypress L. Co. (45 La. Ann. 17), 166.
- Devereaux v. McMahon (108 N. C. 134), 458.
- Devereaux v. Sun F. Office (51 Hun, 147; 20 N. Y. State Rep. 584), 164.
- Devlin v. New York (53 N. Y. State Rep. 455), 474.
- Dewey v. Toledo, A. A. & N. W. M. R. Co. (Mich., 51 N. W. Rep. 1065), 244.
- De Witt v. Barley (17 N. Y. 340), 359.
- Dewitt v. Perry (134 U. S. 306), 163.
- Dewitt v. Yates (10 Johns. 156), 257.
- Dexter v. Long (2 Wash. 435; 26 Am. St. Rep. 867), 246.
- Dexter v. Ohlander (93 Ala. 441), 203.
- Dey v. Dey (19 N. J. Eq. 137), 257.
- Dibble v. Dimick (53 N. Y. State Rep. 225), 103.
- Dick Bros. Quincy Brew. Co. v. Finnell (39 Mo. App. 276), 178.
- Dickerson v. Matheson (50 Fed. Rep. 73), 456.
- Dickinson v. Dickinson (63 Hun, 576; 45 N. Y. State Rep. 323), 74.
- Dickinson v. Leominster Sav. Bank (152 Mass. 49), 230.
- Dickson v. Shay (45 N. J. Eq. 821), 429.
- Dickson v. Williamson (3 How. (U. S.) 57), 508.
- Didsbury v. Thomas (14 East, 323), 294.
- Diel v. Missouri P. R. Co. (37 Mo. App. 454), 437.
- Dike v. Arnold (Mich., 44 N. W. Rep. 407), 52, 147.
- Dillebar v. Home Life Ins. Co. (69 N. Y. 256), 5, 499.
- Dillebar v. Home Life Ins. Co. (87 N. Y. 79), 372.
- Dimmick v. Dimmick (95 Cal. 323), 419.
- Dimmitt v. Hannibal & St. J. R. Co. (40 Mo. App. 654), 424.
- Dingeldein v. Third Ave. R. Co. (9 Bosw. 79), 30.
- Dircks v. German Ins. Co. (34 Mo. App. 31), 187.
- Dixon v. Dunham (13 Ill. 324), 173.
- Dixon v. Hammond (2 B. & A. 313), 510.
- Dobb v. Justice (17 Ga. 624), 323.
- Dobbins v. Brown (119 N. Y. 188; 28 N. Y. State Rep. 957), 426.
- Dobson v. Cothran (34 S. C. 518), 287.
- Doctor v. Darling (68 Hun, 70; 52 N. Y. State Rep. 221), 209.
- Dodd v. Templeman (76 Tex. 57), 154.
- Dodge v. Crandall (30 N. Y. 306), 191.
- Dodge v. Kiene (Neb., 44 N. W. Rep. 191), 187.
- Dodge City v. Wright (48 Kan. 667), 9.
- Doe v. Andrews (12 Q. B. 758), 291.
- Doe v. Barton (11 A. & E. 307), 509.
- Doe v. Baytup (3 A. & E. 188), 510.
- Doe v. Bevis (7 C. B. 456), 300.
- Doe v. Davis (12 Q. B. 323), 285.
- Doe v. Jewell (18 N. H. 340), 297.
- Doe v. Pegg (1 T. R. 760), 509.
- Doe v. Provost (4 John. 61), 253.
- Doe v. Randall (2 Moore & P. 20), 285.
- Doe v. Roe (31 Ga. 593), 293.
- Doe v. Roe (32 Hun, 628), 379.
- Doe v. Sackemore (5 A. & E. 705), 402.
- Doe v. Sisson (12 East, 62), 279.
- Doe v. Smyth (4 M. & S. 347), 509.
- Doe v. Turford (3 B. & Ad. 898), 302.
- Doe v. Wilson (10 Moore Priv. Coun. Cas. 502), 402.

The references are to pages.

- Doeherty v. Matsell (119 N. Y. 646), 460.
- Dolan v. Mayor, etc. (66 N. Y. 278), 266.
- Dolder v. Huntingfield (11 Ves. 292), 90.
- Donaldson v. Everhart (50 Kan. 718), 327.
- Donohue v. Whitney (133 N. Y. 178; 39 N. Y. State Rep. 706), 123, 295.
- Donohue v. Whitney (133 N. Y. 178; 44 N. Y. State Rep. 508), 296.
- Donovan v. Boston & M. R. Co. (158 Mass. 450; 47 Alb. L. J. 351), 317.
- Donovan v. Clark (138 N. Y. 631; 52 N. Y. State Rep. 358), 326.
- Dooley v. Moan (57 Hun, 535; 33 N. Y. State Rep. 118), 306, 313.
- Doolittle v. Bishop (25 Wend. 414), 297.
- Doolittle v. Eddy (7 Barb. 74), 378.
- Doolittle v. Ferry (20 Kan. 230), 199.
- Doolittle v. Lewis (7 Johns. Ch. 45), 247.
- Dorsey v. Pike (57 Hun, 586; 32 N. Y. State Rep. 258), 437.
- Douglass v. Chapin (26 Conn. 76), 347.
- Douglass v. Howland (24 Wend. 35), 111.
- Dow v. Merrill (65 N. H. 107), 109.
- Dowd v. Watson (105 N. C. 476), 446.
- Dowden v. Cryden (N. J., 26 Atl. Rep. 941), 327.
- Dowell v. Guthrie (99 Mo. 653), 423.
- Dowling v. Salliotte (83 Mich. 131), 151.
- Downey v. Sawyer (157 Mass. 418), 108.
- Downing v. O'Brien (67 Barb. 582), 40.
- Downs v. New York C. R. Co. (47 N. Y. 83), 308.
- Dox v. Backenstore (12 Wend. 542), 247.
- Doyle v. Manhattan R. Co. (128 N. Y. 488), 377.
- Doyle v. San Diego Land & T. Co. (46 Fed. Rep. 709), 243.
- Drake v. State (27 Tex. App. 265), 390.
- Draper v. Delaware & H. C. Co. (118 N. Y. 118), 427.
- Dressler v. Hard et al. (127 N. Y. 235; 38 N. Y. State Rep. 147), 403.
- Drew v. Tarbell (117 Mass. 90), 75.
- Drinkwater v. Porter (7 C. & P. 181), 279.
- Driver v. Ford (90 Ill. 595), 150.
- Druly v. Johnson (21 Ill. App. 267), 392.
- Drummond v. Prestman (13 Wheat. 515), 110.
- Dryer v. Brown (52 Hun, 321; 23 N. Y. State Rep. 695), 7, 139.
- Dubois v. Baker (30 N. H. 355), 249.
- Dubois v. Hermance (56 N. Y. 673), 32.
- Duchess of Kingston's Case (20 St. Tr. 572), 55.
- Ducie v. Ford (138 U. S. 587), 151.
- Ducker v. Whitson (112 N. C. 44), 302.
- Dudley v. Bolles (24 Wend. 471), 7.
- Duffield v. Hue (106 Pa. St. 622), 79.
- Duffield v. Hue (129 Pa. St. 94), 248.
- Dufford v. Smith (46 N. J. Eq. 216), 230.
- Duffy v. O'Donovan (46 N. Y. 223), 36.
- Duffy v. People (26 N. Y. 588), 115.
- Dugan v. Chicago, St. P., M. & O. R. Co. (Wis., 55 N. W. Rep. 894), 317.
- Duncan v. Preferred Mut. Acc. Ass'n (129 N. Y. 623; 36 N. Y. State Rep. 929), 165.
- Dunham v. Dey (13 Johns. 44), 171.
- Dunham v. Rix (Iowa, 53 N. W. Rep. 252), 362.
- Dunlavy v. Watson (38 Iowa, 398), 215.
- Dunn v. O'Keefe (45 Hun, 648; 31 N. Y. State Rep. 311), 108.
- Dunn v. Rector of St. Andrews (14 Johns. 118), 245.

The references are to pages.

- Duquid v. Edwards (50 Barb. 288), 166.
- Durant v. Essex Co. (7 Wall. 82), 508.
- Durgin v. Ireland (14 N. Y. 322), 192.
- Dusenbury v. Hoyt (53 N. Y. 521), 30.
- Dutton v. Kneeb (Iowa, 45 N. W. Rep. 875), 10.
- Dutton v. Woodman (9 Cush. 255), 144.
- Dwight v. Germania L. Ins. Co. (103 N. Y. 358), 215.
- Dwyer v. Collins (7 Ex. 639), 132.
- Dye v. Scott (35 Ohio St. 194; 35 Am. Rep. 604), 198.
- Dyett v. Pendleton (8 Cow. 727), 32.
- E.**
- Eagan v. Green (Mich., 45 N. W. Rep. 74), 277.
- Eagle Bank v. Chapin (3 Pick. 180), 132.
- Eagle's Case (3 Abb. Pr. (N. Y.) 218), 445.
- Eagle v. Chicago, M. & St. P. R. Co. (77 Iowa, 661), 424.
- Earle v. Earle (11 Allen (Mass.), 1), 344.
- Early v. Commonwealth (Va., 11 S. E. Rep. 795), 116.
- East Pa. R. Co. v. Hiester (40 Pa. St. 53), 484.
- East St. Louis Connecting R. Co. v. Wabash, St. L. & P. R. Co. (24 Ill. App. 279), 242.
- East Tenn., V. & G. R. Co. v. Watson (Ala., 7 S. Rep. 813), 364.
- Easterly v. Cole (3 N. Y. 502), 169.
- Eastman v. Shaw (65 N. Y. 522), 202.
- Eaton v. Casson (53 Me. 510), 398.
- Eaton v. Tallmadge (24 Wis. 217), 285.
- Eaton v. Walker (76 Mich. 579), 241.
- Eaton v. White (18 Wis. 518), 428.
- Ebersole v. Rankin (102 Mo. 488), 127.
- Eby v. Eby (5 Pa. St. 435), 335.
- Eccles v. Rodman (57 N. Y. State Rep. 657), 12, 491.
- Eddy v. Lafayette (49 Fed. Rep. 807), 428.
- Edison Elect. L. Co. v. U. S. Elect. L. Co. (44 Fed. Rep. 294), 52.
- Edwards v. Clark (83 Mich. 246), 149.
- Edwards v. Cook (4 East, 39), 348.
- Edwards v. Williams (3 Miss. (2 How.) 846), 106.
- Eighmie v. Taylor (98 N. Y. 288), 183.
- Eisenlord v. Clum (126 N. Y. 552; 38 N. Y. State Rep. 446), 79, 284.
- Elam v. State (25 Ala. 53), 16.
- Elbridge v. State (27 Fla. 162), 12.
- Eldridge v. Hargreaves (30 Neb. 638), 271.
- Elgin v. Joslyn (36 Ill. App. 301), 407.
- Elison v. Jones (15 N. Y. Supp. 356), 419.
- Elkhart v. Witman (122 Ind. 538), 404.
- Elliot v. Dudley (19 Barb. 326), 272.
- Elliot v. Nicholls (7 Gill, 85), 113.
- Elliot v. Pearl (1 McLean, 211), 295.
- Elliot v. Piersol (1 Pet. 337), 290.
- Ellis v. Darden (86 Ga. 368), 142.
- Ellis v. Harris (106 N. C. 395), 341.
- Ellis v. Harrison (104 Mo. 270), 150.
- Ellis v. James (10 Cal. 456), 297.
- Ellis v. People (21 How. Pr. 356), 399.
- Ellis v. Simpkins (81 Mich. 1), 315.
- Ellis v. State (74 Wis. 45), 343.
- Ellis v. Whitehead (95 Mich. 105), 489.
- Ellison v. Sexton (105 N. C. 356), 273.
- Elmira Iron & S. R. M. Co. v. Harris (124 N. Y. 280), 270.
- Elmore v. State (Ala., 13 S. Rep. 427), 109.
- Elsworth v. Fogy (35 Vt. 355), 235.
- Elsworth v. Nelson (81 Iowa, 57), 98.
- Elwood v. Western U. T. Co. (45 N. Y. 549), 513.
- Ely v. Ehle (3 N. Y. 506), 229.
- Emerson v. Mills (83 Tex. 385), 452.
- Emerson v. Parsons (46 N. Y. 560), 270.
- Emerson v. Thompson (16 Mass. 429), 104.

The references are to pages.

- Emerson v. White (29 N. H. 491), 261, 285.
- Emery v. Webster (42 Me. 204), 177.
- Englehorn v. Reittinger (122 N. Y. 76; 33 N. Y. State Rep. 276), 187.
- Enliss v. McAdam (108 N. C. 507), 151, 295.
- Ennis v. Smith (14 How. (U. S.) 400), 127, 360.
- Eno v. Crook (10 N. Y. 60), 239.
- Enos v. Enos (135 N. Y. 609; 48 N. Y. State Rep. 391), 488.
- Enos v. State, Goder (131 Ind. 560), 417.
- Ensign v. Ensign (120 N. Y. 655; 31 N. Y. State Rep. 657), 200.
- Ensley R. Co. v. Chewing (93 Ala. 24), 408.
- Epps v. State (19 Ga. 102), 16.
- Equitable Bank v. Cloassen (51 N. Y. State Rep. 503), 9.
- Erlinger v. Bouceau (51 Ill. 94), 101.
- Erskine v. Aduane (L. R. 8 Ch. App. 756), 197.
- Erskine v. Davis (25 Ill. 251), 260.
- Erwin v. Brooks (111 N. C. 358), 232.
- Eskridge v. Cincinnati, N. O. & T. P. R. Co. (Ky., 12 S. E. Rep. 580), 408.
- Eskridge v. State (25 Ala. 30), 115.
- Esselstyne v. Weeks (12 N. Y. 635), 30.
- Ethridge v. Balin (72 N. C. 213), 206.
- Evans v. Covington (70 Ala. 440), 455.
- Evans v. Evans (41 Cal. 103), 448.
- Evans v. McKee (152 Pa. St. 89), 336.
- Evans v. Montgomery (95 Mich. 494), 103.
- Evans v. State (Ark., 22 S. W. Rep. 1026), 298.
- Evanston v. Gunn (99 U. S. 660), 290.
- Everett v. State (30 Tex. App. 682), 53.
- Everts v. Young (52 Vt. 328), 296.
- Ewing v. Savory (3 Bibb, 235), 289.
- Ewing v. Sparks (7 N. J. L. 59), 307.
- Ex parte McCabe (46 Fed. Rep. 363), 87.
- Ex parte Patterson (33 Ala. 74), 92.
- F.**
- Fairbanks v. Philips (22 Pick. 535), 459.
- Fairbanks v. Sargeant (117 N. Y. 320), 238.
- Fairchild v. Fairchild (64 N. Y. 471), 147.
- Fairfax v. Fairfax (2 Cranch, Cir. Ct. 25), 122.
- Fairly v. Fairly (38 Miss. 280), 293.
- Fan v. Payne (40 Vt. 615), 439.
- Farley v. McConnell (52 N. Y. 630), 309.
- Farley v. State (127 Ind. 419), 435.
- Farmers', etc. Co. v. Commercial Bank (15 Wis. 424), 179.
- Farmers' & Citizens' Bank v. Sherman (33 N. Y. 69), 235.
- Farnham v. Hotchkiss (2 Abb. Ct. App. Dec. 93), 30.
- Farr v. Duxtator (29 N. Y. State Rep. 531), 158.
- Farr v. Nichols (132 N. Y. 327; 44 N. Y. State Rep. 555), 180.
- Farrand v. Aldrich (85 Mich. 593), 407.
- Farrer v. Churchill (133 U. S. 609), 435.
- Farrer v. Snyder (31 Mo. App. 93), 348.
- Farron v. Sherwood (17 N. Y. 227), 35.
- Faulkner v. Adams (126 Ind. 459), 458.
- Faulkner v. National Sailors' Home (155 Mass. 458), 154, 254.
- Faulkner v. Territory (N. M., 30 Pac. Rep. 905), 232.
- Fawks v. Lamb (31 L. J. Q. B. 98), 167.
- Faxon v. Hollis (13 Mass. 428), 305.
- Fay v. Harland (128 Mass. 244), 331.
- Feeney v. Long Island R. Co. (116 N. Y. 375; 26 N. Y. State Rep. 729), 57.
- Felix v. State (18 Ala. 720), 16.
- Fell v. Beyer (38 N. Y. 161), 36.
- Fellows v. Little (46 N. H. 37), 251.

The references are to pages.

- Fells v. Vestrali (2 Keyes, 152), 34.
 Fenner v. Lewis (10 Johns. 38), 110.
 Fenno v. Harman (127 N. Y. 635; 32 N. Y. State Rep. 760), 435.
 Fenno v. Weston (31 Vt. 345), 108.
 Ferguson v. Baker (116 N. Y. 257; 26 N. Y. State Rep. 626), 175.
 Ferguson v. Hubbell (26 Hun, 250), 367.
 Ferguson v. Hubbell (97 N. Y. 507), 358.
 Ferguson v. McBean (91 Colo. 63), 55.
 Ferguson v. Rafferty (128 Pa. St. 337), 175.
 Ferris v. Hard (135 N. Y. 354; 48 N. Y. State Rep. 518), 41, 180.
 Ferris v. Tannebaum (39 N. Y. State Rep. 71), 12, 42.
 Fertilizer Co. v. Logan (90 Ala. 325), 37.
 Fetherly v. Burke (54 N. Y. 646), 36.
 Field v. Munson (47 N. Y. 221), 177.
 Fife v. Commonwealth (29 Pa. St. 429), 115.
 Filer v. N. Y. C. & H. R. R. Co. (49 N. Y. 42, 47), 264, 374.
 Filkins v. Baker (6 Lans. 518), 311.
 Filkins v. Whyland (24 N. Y. 338), 188.
 Finch v. Chicago, M. & St. P. R. Co. (46 Minn. 250), 480.
 Finch v. Gridley (25 Wend. 469), 245.
 Finfroch v. Kohl (9 Lans. L. Rev. 313), 451.
 Fink v. Algermissen (25 Mo. App. 186), 354.
 Fink v. Manhattan R. Co. (29 N. Y. State Rep. 153), 447.
 Finn v. Brown (142 U. S. 56), 418.
 Firno v. Paulding (6 N. Y. Supp. 122), 375.
 First Nat. Bank v. Balcom (35 Conn. 357), 259.
 First Nat. Bank v. Green (43 N. Y. 298), 432.
 First Nat. Bank v. McManigle (69 Pa. St. 156), 453.
 First Nat. Bank v. Moffatt (39 N. Y. 668), 433.
 First Nat. Bank v. Ocean Nat. Bank (60 N. Y. 290), 29, 244.
 First Nat. Bank of Hornellsville v. Hyland (125 N. Y. 711), 400.
 First Nat. Bank, etc. v. Warner (55 Hun, 120), 229.
 Fish v. Dodge (4 Denio, 311), 474.
 Fish v. Hubbard (21 Wend. 651), 177.
 Fisher v. Fisher (129 N. Y. 654; 42 N. Y. State Rep. 100), 56.
 Fisher v. Hue (38 Me. 534), 111.
 Fisher v. Munroe (42 N. Y. State Rep. 118), 439.
 Fisher v. Munroe (51 N. Y. State Rep. 585), 103, 371.
 Fisks v. Gowing (61 N. H. 431), 392.
 Fister v. La Rue (15 Barb. 323), 245.
 Fitch v. Carpenter (43 Barb. 40), 150.
 Fitch v. Packham (16 Vt. 150), 430.
 Fitschen v. Thomas (9 Mont. 52), 230, 437.
 Fitzgerald v. Adams (9 Ga. 471), 120.
 Fitzgerald & M. Const. Co. v. Fitzgerald (137 U. S. 98), 246.
 Fitzhugh v. Franco Texan L. Co. (81 Tex. 306), 244.
 Fitzpatrick v. Fitzpatrick (14 Am. Rep. 538), 256.
 Fitzpatrick v. Moore (53 Ark. 4), 179.
 Flagler v. Wheeler (40 Hun, 129), 339.
 Flanders v. Chicago, St. P., M. & O. R. Co. (Minn., 53 N. W. Rep. 544), 166.
 Flanders v. Fay (40 Vt. 316), 196.
 Flannery v. Van Tassel (131 N. Y. 639; 43 N. Y. State Rep. 324), 353.
 Fleischman v. Stern (90 N. Y. 114), 26, 41.
 Fleischmann v. Toplitz (134 N. Y. 349), 496.
 Fleming v. Claffin (1 Ind. App. 537), 408.
 Fleming v. People (27 N. Y. 329), 260.
 Fleming v. State (5 Humph. 564), 17.
 Fleshman v. Collier (47 Ga. 253), 271.
 Florey v. Florey (24 Ala. 241), 254.
 Floyd v. State (7 Tex. 215), 35.

The references are to pages.

- Flynn v. Coffee (12 Allen, 133), 289, 444.
 Flynn v. McKeon (6 Duer, 203), 38.
 Flynn v. Massachusetts Ben. Ass'n (152 Mass. 288), 230.
 Flynn v. Murphy (2 E. D. Smith (N. Y.), 378), 17.
 Flynn v. St. Louis & S. R. Co. (43 Mo. App. 424), 426.
 Fergus v. Chicago & A. R. Co. (50 Mo. App. 250), 229.
 Fonda v. Burton (63 Vt. 355), 194.
 Forbask v. Goodwin (25 N. H. 425), 209.
 Forbes v. Haas (32 N. Y. State Rep. 107), 328.
 Ford v. Babcock (2 Sandf. 518), 217.
 Ford v. Illinois R. C. Co. (4 Ill. App. 222), 371.
 Ford v. Orvis (42 Kan. 302), 394.
 Ford v. Simmons (13 La. Ann. 397), 419.
 Forde v. Nichols (36 N. Y. State Rep. 729), 377.
 Fordyce v. Withers (1 Tex. Civ. App. 540), 221.
 Forehand v. State (Ark., 13 S. W. Rep. 728), 98.
 Forron v. Sherwood (17 N. Y. 227), 37.
 Forsaith v. Clark (21 N. H. 424), 442.
 Fort v. Gooding (9 Barb. 371), 235.
 Fort Scott, W. & W. R. Co. v. Kar-racker (46 Kan. 511), 427.
 Fort Worth & D. C. R. Co. v. Great-house (82 Tex. 104), 367.
 Fort Worth & D. C. R. Co. v. Thompson (75 Tex. 501), 364.
 Fort Worth & D. C. R. Co. v. Word (Tex., 21 S. W. Rep. 607), 475.
 Fort Worth Pub. Co. v. Hetson (80 Tex. 216), 344.
 Fortescue v. Crawford (105 N. C. 29), 190.
 Forward v. Adams (7 Wend. 204), 28.
 Forward v. Harris (30 Barb. 338), 130.
 Foscue v. Lyon (55 Ala. 440), 95.
 Foss v. Baker (62 N. H. 247), 423.
 Foster v. Dickerson (64 Vt. 233), 252.
 Foster v. Foster (62 Vt. 532), 481.
 Foster v. Hall (12 Pick. 89), 50.
 Foster v. Hawley (8 Hun, 68), 261.
 Foster v. Pierce (11 Cush. 437), 45.
 Foster v. State (88 Ala. 182), 131.
 Foval v. Foval (39 Ill. App. 644), 12.
 Fowle v. Park (48 Fed. Rep. 789), 94.
 Fowler v. Fowler (33 N. Y. State Rep. 746), 62.
 Fowler v. Simpson (79 Tex. 611), 335.
 Fox's Appeal (141 Pa. St. 266), 138.
 Fox v. Clark (61 Barb. 216), 249.
 Fox v. Commonwealth (81 Pa. St. 511), 93.
 Fox v. McComb (63 Hun, 633; 45 N. Y. State Rep. 754), 209.
 Fox v. Peninsula W. D. & C. Works (84 Mich. 676), 315.
 Fox v. Peninsula W. D. & C. Works (92 Mich. 243), 379.
 Fox v. Rail (3 Johns. 477), 121.
 Fox v. Village of Ft. Edwards (121 N. Y. 666; 48 Hun, 363; 16 N. Y. State Rep. 303), 392.
 Foxhall v. International Land Credit Co. (16 L. T. (N. S.) 637), 167.
 Foyer v. Leighton (22 N. H. 71), 166.
 Frace v. N. Y., L. E. & W. R. Co. (68 Hun, 325), 361.
 Franc v. Dickinson (125 N. Y. 710; 34 N. Y. State Rep. 864), 513.
 Francis v. New York Steam Co. (114 N. Y. 380), 369.
 Frantz v. Ireland (66 Barb. 383), 450.
 Frasier v. Sneath (2 Nev. 120), 192.
 Frazer v. Tuppe (29 Vt. 409), 368.
 Frear v. Evertson (20 Johns. 142), 335.
 Freeman v. Cooke (2 Ex. 661), 509.
 Freeman v. Ellison (37 Mich. 459; 18 Alb. L. J. 210), 33.
 Freeman v. Phillip (4 M. & S. 486), 281.
 Freeman v. Sanderson (123 Ind. 264), 392.
 Freeman Sav. & T. Co. v. Dodge (93 U. S. 379), 339.
 Freemont Cultivator Co. v. McCanny (80 Ga. 343), 437.

The references are to pages.

- | | |
|---|---|
| <p>Freiberg v. Brunswick-Balke-Collender Co. (Tex., 16 S. W. Rep. 784), 328.</p> <p>Freiberg v. Freiberg (74 Tex. 122), 354.</p> <p>Frensch v. Ottenburg (54 Fed. Rep. 867), 474.</p> <p>Frese v. State (23 Fla. 267), 89.</p> <p>Friese v. Kreppe (70 Ill. 496), 215.</p> <p>Fritz v. Brander (78 Pa. St. 345), 459.</p> <p>Frost v. Blanchard (97 Mass. 155), 206.</p> <p>Frost v. Wolf (77 Tex. 455), 135.</p> <p>Fry v. Freamster (36 W. Va. 454), 340.</p> <p>Fudge v. Payne (Va., 10 S. E. Rep. 7), 207.</p> <p>Fugler v. Rothe (43 Mo. App. 44), 425.</p> <p>Fulcher v. State (28 Tex. App. 465), 298.</p> <p>Fuller v. Artman (69 Hun, 546; 53 N. Y. State Rep. 339), 180.</p> <p>Fuller v. Hutchins (10 Cal. 528), 432.</p> <p>Fuller v. Jackson (92 Mich. 197), 372.</p> <p>Fuller v. Rowe (57 N. Y. 23), 271.</p> <p>Fullerton v. Hill (48 Kan. 558), 189.</p> <p>Fusting v. Sullivan (41 Md. 162), 143.</p> | <p>Gallagher v. Proctor (84 Me. 41), 423.</p> <p>Gallup v. Lederer (1 Hun, 282), 166.</p> <p>Gallup v. Smith (59 Conn. 354), 207.</p> <p>Galpin v. Page (18 Wall. 364), 420.</p> <p>Galveston, H. & S. A. R. Co. v. Cooper (85 Tex. 431), 361.</p> <p>Galveston Rope & T. Co. v. Burkett (Tex., 21 S. W. Rep. 958), 384.</p> <p>Galvin v. Meridian Nat. Bank (129 Ind. 439), 433.</p> <p>Galway's Appeal (34 Pa. St. 242), 193.</p> <p>Ganson v. Madigan (15 Wis. 144), 172.</p> <p>Gantier v. State (Tex., 21 S. W. Rep. 255), 403.</p> <p>Gardenier v. Frieze (16 R. I. 19), 355.</p> <p>Gardner v. Brookline (127 Mass. 358), 483.</p> <p>Gardner v. Watson (76 Tex. 25), 158.</p> <p>Gardner v. Wright (15 L. T. (N. S.) 325), 133.</p> <p>Garland v. Jacomb (L. R. 8 Ex. 216), 510.</p> <p>Garner v. Fite (93 Ala. 405), 203.</p> <p>Garner v. State (28 Tex. App. 561), 363.</p> <p>Garregus v. Home F. & F. Mis. Soc. (3 Ind. App. 91), 431.</p> <p>Garrett v. Heflin (Ala., 13 S. Rep. 326), 235.</p> <p>Garvey v. Fowler (6 Duer, 587), 33.</p> <p>Garwood v. Hasings (38 Cal. 229), 443.</p> <p>Garwood v. N. Y. C. & H. R. R. Co. (45 Hun, 128), 367.</p> <p>Gary v. Nicholson (24 Wend. 350), 415.</p> <p>Gasper v. Heimbach (Minn., 55 N. W. Rep. 559), 203.</p> <p>Gates v. Chicago & A. R. Co. (44 Mo. App. 488), 371.</p> <p>Gates v. People (14 Ill. 433), 115.</p> <p>Gay v. Southworth (113 Mass. 333), 458.</p> <p>Gebhart v. Skinner (15 Serg. & Rawle, 235), 72.</p> <p>Gehr v. Fisher (143 Pa. St. 311), 316.</p> <p>Geisinger v. Beyl (80 Wis. 443), 438.</p> <p>Geisinger v. Tanenbaum (124 N. Y. 650), 374.</p> |
|---|---|

G.

The references are to pages.

- General Ass. Pres. Church v. Guthrie (Va., 10 S. E. Rep. 318), 255.
- Gentry v. Kelly (49 Kan. 82), 391.
- Geoghegan v. Atlas Steamship Co. (51 N. Y. State Rep. 868), 223.
- George v. Jay (19 N. H. 544), 310.
- George v. Thomas (16 Tex. 74), 347.
- Georgia R. & Bkg. Co. v. Esken (86 Ga. 641), 390.
- Georgia R. R. Co. v. Davis (92 Ala. 300), 425.
- Georgia R. R. Co. v. Gaines (88 Ala. 377), 94.
- Georgia R. R. Co. v. Hughart (90 Ala. 36), 426.
- Georgia R. R. Co. v. Love (91 Ala. 431), 424.
- Gerard v. Cowperthwait (50 N. Y. State Rep. 592), 180.
- Gerard v. Kalamazoo (92 Mich. 610), 33.
- Gerber v. Metropolitan El. R. Co. (52 N. Y. State Rep. 444), 475.
- Gerbig v. N. Y., L. E. & W. R. Co. (67 Hun, 649; 51 N. Y. State Rep. 534), 385.
- Gerding v. Walter (29 Mo. 426), 451.
- Gereke v. Grand Rapids & T. R. Co. (57 Mich. 589), 363.
- Geresch v. McDonald (103 Mo. 1), 435.
- German Bank v. American F. & M. Ins. Co. (83 Iowa, 491), 455.
- German Nat. Bank v. Elwood (16 Colo. 244), 420.
- Gerow v. Providence Wash. Ins. Co. (28 N. Y. 435), 407.
- Gerrish v. Sweetzer (4 Pick. 374), 64.
- Gerry v. Post (13 How. Pr. (N. Y.) 118), 445.
- Gettleman v. Gietz (78 Wis. 439), 419.
- Gibbons v. Phoenix (61 Hun, 619; 39 N. Y. State Rep. 658), 396.
- Gibney v. Marchay (34 N. Y. 301), 106, 297.
- Gibson v. J. Snow Hardware Co. (94 Ala. 346), 328.
- Gibson v. State (89 Ala. 121), 231, 435.
- Gibson v. Toby (46 N. Y. 637), 236.
- Gibson v. Trinity County (80 Cal. 359), 137, 315.
- Gibson v. Warden (14 Wall. 244), 272.
- Gilbert v. Sage (57 N. Y. 639), 7.
- Gilbert v. Whidden (20 Me. 368), 270.
- Gildersleeve v. Caraway (10 Ala. 260), 314.
- Gildersleeve v. New Mexico Min. Co. (N. M., 27 Pac. Rep. 318), 434.
- Gill v. Homrighausen (79 Wis. 634), 425.
- Gillingham v. Charlestown Tow-boat & T. R. Co. (40 Fed. Rep. 649), 108.
- Gillis v. Smither (2 Stark, 528), 121.
- Gillis v. Wilmington, O. & E. C. R. Co. (108 N. E. Rep. 441), 127, 135.
- Gilman v. Sheets (78 Iowa, 499), 447.
- Gilmore v. Wilson (53 Pa. St. 194), 308.
- Glann v. Younglove (37 Barb. 480), 262.
- Glaspie v. Keator (56 Fed. Rep. 203), 209.
- Glass v. Beach (5 Vt. 72), 313.
- Glass v. Bennett (89 Tenn. 478), 323.
- Gleadon v. Atkins (1 C. & M. 423), 300.
- Glenn v. Liggett (47 Fed. Rep. 472), 55, 240.
- Glieson v. Virginia M. R. Co. (140 U. S. 435), 424.
- Globe Printing Co. v. Stahl (23 Mo. App. 451), 93, 355.
- Glover v. Manhattan R. Co. (N. Y., 51 Supr. Ct. 1), 365.
- Glungston v. Griggs (5 Ga. 424), 105.
- Glynn v. George (20 N. H. 114), 510.
- Godine v. Kidd (46 Alb. L. J. 171; 64 Hun, 585; 46 N. Y. State Rep. 813), 78.
- Golding v. Orcutt (44 Vt. 541), 308.
- Goldsborough v. Pidduck (Iowa, 54 N. W. Rep. 431), 294.
- Gommersall v. Crew (31 N. Y. State Rep. 555), 64.
- Gonzales v. State (31 Tex. Cr. Rep. 508), 131.
- Goodbar v. City Nat. Bank (78 Tex. 461), 328.

The references are to pages.

- | | |
|---|--|
| <p>Goodman v. Goetz (36 N. Y. State Rep. 731), 271.</p> <p>Goodman v. Harvey (4 Ad. & E. 870), 511.</p> <p>Goodnight v. Moss. (Cowp. 594), 287.</p> <p>Goodwyn v. Baldwin (59 Ala. 127), 415.</p> <p>Gord v. Needs (2 M. & W. 129), 160.</p> <p>Gorder v. Plattsmouth Can. Co. (36 Neb. 19; 41 Am. & Eng. Corp. Cas. 87), 232.</p> <p>Gordon v. Bowers (16 Pa. St. 226), 276.</p> <p>Gordon v. Niemann (118 N. Y. 152; 28 N. Y. State Rep. 616), 187.</p> <p>Gorham v. Canton (5 Me. 266), 344.</p> <p>Gorman v. Minneapolis & St. L. R. Co. (78 Iowa, 509), 315.</p> <p>Gosling v. Birnie (7 Bing. 339), 510.</p> <p>Gott v. Densmore (111 Mass. 51), 246.</p> <p>Gould v. Chase (16 John. 226), 452.</p> <p>Gould v. Evansville & C. R. Co. (91 U. S. 526), 507.</p> <p>Goulding v. Clark (34 N. H. 148), 241.</p> <p>Gourley v. St. L. & S. F. R. Co. (35 Mo. App. 87), 378.</p> <p>Gowdy v. Gordon (122 Ind. 433), 203.</p> <p>Grace v. Dempsey (75 Wis. 313), 10.</p> <p>Grace v. Lynch (80 Wis. 166), 192.</p> <p>Grafton Bank v. Moore (13 N. H. 99), 104.</p> <p>Grafton Bank v. Moore (14 N. H. 145), 271.</p> <p>Graham v. Anderson (42 Ill. 514), 92.</p> <p>Graham v. Pennsylvania Co. (139 Pa. St. 149), 369.</p> <p>Graham v. People (63 Barb. 468), 50.</p> <p>Graham v. State (28 Tex. App. 582), 363.</p> <p>Graham v. Whitely (26 N. J. L. 262), 421.</p> <p>Graham v. Williams (21 La. Ann. 594), 99.</p> <p>Grahlman v. Chicago, St. P. & K. C. R. Co. (78 Iowa, 564), 380.</p> <p>Grand Rapids & Ind. R. Co. v. Huntley (38 Mich. 538), 330.</p> | <p>Grange v. Palmer (56 Hun, 481; 31 N. Y. State Rep. 612), 192.</p> <p>Granning v. Swenson (49 Minn. 381), 308.</p> <p>Grant v. Henry Clay Co. (80 Pa. St. 208), 319.</p> <p>Grant v. Grant (109 N. C. 710), 417.</p> <p>Grant v. State (89 Ga. 393), 87.</p> <p>Gratz v. Beats (45 Pa. St. 495), 104.</p> <p>Graves v. Battle Creek (95 Mich. 266), 139.</p> <p>Graves v. Gilchrist (29 N. Y. State Rep. 638), 22.</p> <p>Graves v. Harwood (9 Barb. 477), 191.</p> <p>Graves v. Merchants' & B. Ins. Co. (Iowa, 49 N. W. Rep. 65), 478.</p> <p>Graves v. Spedden (46 Ind. 527), 149.</p> <p>Graves v. Wood (3 B. Mon. (Ky.) 34), 236.</p> <p>Gray v. Cruin (36 Ala. 558), 420.</p> <p>Gray v. Gardner (17 Mass. 188), 212.</p> <p>Gray v. Manhattan R. Co. (128 N. Y. 499; 40 N. Y. State Rep. 454), 377.</p> <p>Gray v. Parke (155 Mass. 433), 12.</p> <p>Greany v. Long Island R. Co. (101 N. Y. 419), 11.</p> <p>Great West. R. R. Co. v. Bacon (30 Ill. 347), 212.</p> <p>Green v. Louisville & M. R. Co. (14 Ky. L. Rep. 876), 137.</p> <p>Green v. New River Co. (4 T. R. 570), 506.</p> <p>Green v. Rowarth (113 N. Y. 462; 23 N. Y. State Rep. 149), 235.</p> <p>Green v. State (88 Tenn. 614), 441.</p> <p>Green v. Tower (49 Kan. 302), 420.</p> <p>Greenfield v. Camden (74 Wis. 56), 440.</p> <p>Greenfield v. Chicago & N. W. R. Co. (83 Iowa, 270), 427.</p> <p>Greenfield v. People (85 N. Y. 82), 368.</p> <p>Greenleaf v. Dubuque, etc. R. Co. (30 Iowa, 301), 285.</p> <p>Greenough v. Eccles (28 L. J. C. P. 160), 20.</p> <p>Greenwood v. Lowe (7 La. Ann. 197), 460.</p> |
|---|--|

The references are to pages.

- Greer v. Greer (58 Hun, 251), 54.
 Gregg v. Forsyth (24 How. (U. S.) 79), 291.
 Gregory v. Fichtner (38 N. Y. State Rep. 192; 43 Alb. L. J. 517), 82, 478.
 Gretton v. Weber (47 Fed. Rep. 852), 419.
 Grew v. Walker (17 Ala. 824), 270.
 Grierson v. Mason (60 N. Y. 394), 176.
 Gries v. Blackman (30 Mo. App. 2), 64.
 Griffin v. Long Island R. Co. (101 N. Y. 350), 25.
 Griffin v. Rice (1 Hilt. 184), 168.
 Griffith v. Baltimore & O. R. Co. (44 Fed. Rep. 574), 425.
 Griffith v. Rife (72 Tex. 185), 283.
 Griffith v. Sauls (77 Tex. 630), 295.
 Griffith v. Shipley (74 Md. 592), 15.
 Griggs v. Griggs (66 Barb. 291), 39.
 Grimes v. Hill (15 Colo. 359), 353.
 Grimley v. Hankins (46 Fed. Rep. 400), 424.
 Grimm's Appeal (131 Pa. St. 199), 260.
 Grimstead v. Foote (26 Miss. 476), 420.
 Grinnis v. Hamilton (58 Conn. 69), 218.
 Griswold v. N. Y. C. & H. R. R. Co. (44 Hun, 236), 374.
 Griswold v. N. Y. C. & H. R. R. Co. (115 N. Y. 61; 23 N. Y. State Rep. 729), 399.
 Gromley v. Bunyan (138 U. S. 623), 87.
 Gruber v. Baker (20 Nev. 453), 52.
 Guebert v. Zick (31 Ill. App. 390), 354.
 Guest v. Guest (74 Tex. 664), 352.
 Guidery v. Green (95 Cal. 630), 155.
 Guild's Case (5 Halst. 163), 115.
 Gulerette v. McKinley (27 Hun, 320), 365.
 Gulf, C. & S. F. R. Co. v. Bax (81 Tex. 670), 437.
 Gulf, C. & S. F. R. Co. v. Dunman (Tex., 19 S. W. Rep. 107), 479.
 Gulf, C. & S. F. R. Co. v. Harriet (80 Tex. 73), 306.
 Gulf, C. & S. F. R. Co. v. Hepner (85 Tex. 136), 371.
 Gulf, C. & S. F. R. Co. v. Hudson (77 Tex. 494), 230.
 Gulf, C. & S. F. R. Co. v. Locker (78 Tex. 279), 363.
 Gulf, C. & S. F. R. Co. v. Reed (80 Tex. 362), 458.
 Gulf, C. & S. F. R. Co. v. Rierdon (85 Tex. 511), 221.
 Gulf, C. & S. F. R. Co. v. Vancil (Tex., 21 S. W. Rep. 303), 474.
 Gulf, C. & S. F. R. Co. v. Washington (49 Fed. Rep. 437), 95, 380.
 Gulf, C. & S. F. R. Co. v. Wilson (23 Am. St. Rep. 345), 328.
 Gulfin v. Page (18 Wall. 364), 412.
 Gurnault v. Louisville & N. R. Co. (41 La. Ann. 571), 242.
 Gurnsey v. Rhodes (138 N. Y. 461; 53 N. Y. State Rep. 6), 109.
 Guy v. Mead (22 N. Y. 462), 303.
- ## H.
- Hadcock v. O'Rourke (6 N. Y. Supp. 549), 404.
 Haddon v. People (25 N. Y. 373), 199.
 Hadley v. Carter (8 N. H. 40), 344.
 Haffron v. Cunningham (76 Tex. 312), 204.
 Hagan v. Merchants' & B. Ins. Co. (81 Iowa, 321), 457.
 Hagedorn v. Reed (3 Camp. 377), 134.
 Hagenlocker v. C. I. & Brooklyn R. Co. (99 N. Y. 136), 332.
 Hager v. Cleveland (32 Mich. 476), 316.
 Hager v. Southern P. R. Co. (Cal., 33 Pac. Rep. 119), 222.
 Haggin v. Haggin (35 Neb. 375), 223.
 Hague v. Ahrens (53 Fed. Rep. 58), 232.
 Haile v. Morgan (25 S. C. 601), 341.
 Haines v. Hayden (95 Mich. 332), 302.
 Haines v. Pearce (41 Md. 221), 237.

The references are to pages.

- | | |
|---|---|
| <p>Hair v. Johnson (35 Ill. App. 562), 142.
 Halcomb v. State (28 Ga. 66), 122.
 Hall v. Commonwealth (16 Va. L. J. 547), 299.
 Hall v. German (131 N. Y. 536), 315.
 Hall v. Lauderdale (46 N. Y. 70), 267.
 Hall v. Phelps (2 Johns. 451), 122.
 Hall v. State (132 Ind. 317), 16.
 Hall v. Wilson (16 Barb. 548), 512.
 Hall v. Young (37 N. H. 134), 263.
 Hallahan v. N. Y., L. E. & W. R. Co. (102 N. Y. 194), 365.
 Hallstead v. Carters (143 Pa. St. 352), 241.
 Halpin v. Stone (78 Wis. 183), 179.
 Halpin v. Winkleman, (83 Tex. 165), 453.
 Halsey v. Sinsebaugh (15 N. Y. 435), 303.
 Halton v. Alabama Midland R. Co. (Ala., 12 S. Rep. 276), 386.
 Ham v. Ham (39 Me. 263), 95.
 Hamberger v. Root (6 Watts & Serg. 431), 104.
 Hamill v. Supreme Council of R. A. (152 Pa. St. 537), 155.
 Hamilton Coal Co. v. Bernhard (40 N. Y. State Rep. 875), 245.
 Hamlin v. Dingman (5 Lans. 61), 428.
 Hammain v. Jordan (129 N. Y. 61), 14.
 Hammond v. Deke (42 Minn. 273), 355.
 Hampton v. Dean (4 Tex. 455), 207.
 Hampton v. Hampton (87 Va. 148), 435.
 Hampton v. Levant (59 Me. 559), 259.
 Hampton v. Pullman Palace Car Co. (42 Mo. App. 134), 328.
 Hamrick v. State, Hamrick (Ind., 34 N. E. Rep. 3), 387.
 Hamshaw v. Kline (57 Pa. St. 397), 447.
 Hancock v. Cossett (45 Fed. Rep. 754), 142.
 Hancock v. Flynn (54 Hun, 638), 306.
 Hancock v. McAvoy (151 Pa. St. 439), 9.</p> | <p>Hanford v. Fitch (41 Conn. 486), 459.
 Hann v. Dekater (N. J., 20 Atl. Rep. 657), 335.
 Hanna v. Kankakee (34 Ill. App. 186), 455.
 Hannan v. Gross (32 Pac. Rep. 787), 474.
 Hannis v. Hazlett (54 Pa. St. 139), 263.
 Hannum v. Belchertown (19 Pick. 311), 60.
 Hanson v. Chatovick (13 Nev. 395), 439.
 Hanson v. Eustice's Lessee (2 How. (U. S.) 653), 128.
 Hard v. Ashley (63 Hun, 34; 44 N. Y. State Rep. 792), 55, 77, 249.
 Hard v. Ashley (117 N. Y. 606; 28 N. Y. State Rep. 601), 83.
 Hard v. Thompkins (30 Pac. Rep. 247), 270.
 Hardenburgh v. Cockroft (5 Daly, 79), 370.
 Hardman v. Wilcox (9 Bing. 382), 510.
 Hardy v. Gleason (Oreg., 23 Pac. Rep. 817), 52.
 Hardy v. Merritt (56 N. H. 227), 359.
 Hare v. Mahoney (60 Hun, 576), 383.
 Hargro v. Hodgson (89 Cal. 623), 232.
 Harley v. Buffalo Car Mfg. Co. (65 Hun, 624), 384.
 Harman v. Jordon (129 N. Y. 61), 14.
 Harmon v. Columbia & G. R. Co. (32 S. C. 127), 380.
 Harney v. Farren (89 Cal. 76), 120.
 Harpending v. Shoemaker (37 Barb. 270), 38.
 Harper v. Fairley (53 N. Y. 442), 218.
 Harrell v. Dorrance (9 Fla. 490), 190.
 Harrington v. Hickman (148 Pa. St. 401), 211.
 Harrington v. Winn (60 Hun, 235), 56, 81.
 Harris v. Allen (104 N. C. 86), 152.
 Harris v. Cameron (81 Wis. 239; 45 Alb. L. J. 320), 94.
 Harris v. Clark (3 N. Y. 93), 300.</p> |
|---|---|

The references are to pages.

- Harris v. Dub (57 Ga. 77), 195.
 Harris v. McArthur (90 Ga. 216), 103.
 Harris v. Nations (79 Tex. 409), 363.
 Harris v. Oakley (130 N. Y. 1; 40 N. Y. State Rep. 485), 340.
 Harris v. Schuylkill River & S. R. Co. (141 Pa. St. 242), 480.
 Harris v. Story (2 E. D. Smith, 363), 418.
 Harris v. White (81 N. Y. 532), 27.
 Harris P. S. Co. v. Fisher (81 Mich. 136), 213.
 Harrison v. Glover (72 N. Y. 457), 481.
 Harrison v. McCormack (89 Cal. 327; 23 Am. St. Rep. 469), 175.
 Harrison v. Queen's Ins. Co. (49 Wis. 71), 439.
 Harrison v. Rowan (3 Wash. C. C. 580), 493.
 Harrison v. Trustees, etc. (12 Mass. 456), 496.
 Harrold v. N. Y. C. & H. R. R. Co. (13 Daly, 378), 374.
 Harrow Spring Co. v. Whipple Harrow Co. (90 Mich. 147), 206.
 Harsh v. North (40 Pa. St. 241), 96.
 Hart v. Powell (18 Ga. 635), 324.
 Hart v. Randolph (142 Ill. 521), 336.
 Hart v. State (55 Ind. 599), 95.
 Hart v. Stevenson (25 Conn. 499), 111.
 Hart v. Taylor (70 Miss. 81), 180.
 Hartford v. Champion (58 Conn. 268), 259.
 Hartford Bridge Co. v. Granger (4 Conn. 142), 64.
 Hartshorn v. Chaddock (135 N. Y. 116), 482.
 Hartwell v. Root (19 Johns. 345), 267.
 Harvey v. Thornton (14 Ill. 217), 261.
 Harvey v. Tyler (2 Wall. 332), 421.
 Hasbrouck v. Burhans (47 Hun, 487), 352.
 Hasdins v. Warren (115 Mass. 514), 167.
 Haskinson v. Elliott (62 Pa. St. 293), 272.
 Hastings v. Cunningham (39 Cal. 139), 101.
 Hatch v. Attrill (118 N. Y. 383; 29 N. Y. State Rep. 14), 316.
 Hatch v. Douglass (48 Conn. 116; 40 Am. Rep. 154), 150.
 Hatch v. Spooner (59 Hun, 625), 435.
 Hatfield v. Commonwealth (Ky., 12 S. W. Rep. 309), 346.
 Hathaway v. Addison (48 Me. 440), 320.
 Haulenbech v. McGibbon (60 Hun, 26; 38 N. Y. State Rep. 436), 55.
 Haupton v. Catlin (1 E. D. Smith, 729), 306.
 Hawes v. State (88 Ala. 37), 54.
 Hawes v. Wallock (30 Wis. 213), 235.
 Hawkins v. Front St. Cable Co. (Wash., 28 Am. St. Rep. 72), 422.
 Haws v. Shaw (100 Mass. 187), 509.
 Hay v. Reid (88 Mich. 296), 391.
 Hay v. Robinson (Oreg., 31 Pac. Rep. 62), 232.
 Hayes v. Baxter (65 Barb. 181), 273.
 Hayes v. Ford (55 Ind. 52), 28.
 Hayes v. People (25 N. Y. 396), 261.
 Hayes v. State (58 Ga. 47), 448.
 Hays v. Commonwealth (Ky., 14 S. W. Rep. 833), 98.
 Hays v. Miller (70 N. Y. 112), 368.
 Hays v. Riddle (1 Sandf. 248), 130.
 Hayslip v. Gymer (1 A. & E. 162), 339.
 Hazard v. Spencer (17 R. I. 561), 432.
 Heald v. Cooper (8 Me. 83), 163.
 Heath v. Broadway & S. A. R. Co. (57 Supr. Ct. 496), 63.
 Heath v. Wallace (138 U. S. 573), 97.
 Heath v. Waters (40 Mich. 457), 437.
 Heckhart v. Haine (6 Bin. 16), 121.
 H. E. Clafin Co. v. Rodenburg (Ala., 13 S. Rep. 272), 217.
 Hedge v. Clapp (22 Conn. 262), 21.
 Heffner v. Palmer (67 Ill. 161), 271.
 Heidenheimer v. Bauman (84 Tex. 174; 31 Am. St. Rep. 29), 253.
 Height v. People (50 N. Y. 392), 499.
 Heil v. Redden (45 Kan. 562), 458.
 Heine v. Anderson (2 Duer, 318), 31.
 Heizer v. State (12 Md. 330), 92.

The references are to pages.

- Heller v. Abbott (79 Wis. 409), 427.
Heller v. Peters (140 Pa. St. 648), 131.
Hellmuth v. Katschke (35 Ill. App. 21), 329.
Hellwig v. Benzinger (Md., 22 Atl. Rep. 265), 181.
Hemelreich v. Carlos (24 Mo. App. 264), 263.
Henderson v. Carbondale Coal, etc. Co. (140 U. S. 25), 212.
Hendricks v. Judah (1 Johns. 319), 432.
Hendricks v. McDaniel (80 Ga. 102), 352.
Hendricks v. Steamer Morning Star (18 La. Ann. 353), 191.
Hennesey v. Farrelly (13 Daly, 464), 370.
Henning v. Miller (66 Hun, 588; 50 N. Y. State Rep. 559), 186.
Henry v. Allen (82 Tex. 35), 420.
Henry v. Dulle (74 Mo. 413), 417.
Henry McShane Co. v. Padian (48 N. Y. State Rep. 705), 154.
Henry v. N. Y., L. E. & W. R. Co. (57 Hun, 76), 63.
Henson v. Henderson (21 N. Y. 224), 206.
Hermans v. Ellsworth (64 N. Y. 161), 240.
Hermans v. Guntor (83 Tex. 66; 29 Am. St. Rep. 632), 432.
Hermes v. Chicago, M. & W. R. Co. (80 Wis. 590), 329.
Herrick v. Smith (13 Hun, 446), 7.
Herroy v. Van Pelt (4 Bosw. (N. Y.) 60), 378.
Herscher v. Brazier (38 Ill. App. 654), 340.
Hersey v. Benton (23 Vt. 685), 106.
Hesdra, Matter of (119 N. Y. 615; 28 N. Y. State Rep. 810), 7.
Hess' Appeal (131 Pa. St. 31), 457.
Hess v. Board of Education (33 Ill. App. 440), 175.
Hess v. Lowery (122 Ind. 225), 78, 139.
Hetzler v. Morrell (82 Iowa, 562), 146.
Hewitt v. Eisenbart (36 Neb. 17), 331.
Hewitt v. Harvey (46 Mo. 106), 101.
Hewitt v. John Week Lumber Co. (77 Wis. 548), 164.
Hewitt v. Newburger (48 N. Y. State Rep. 812), 506.
Hewitt v. State (121 Ind. 245), 120.
Hewlett v. Wood (55 N. Y. 634), 373.
Hicklin v. McClear (18 Oreg. 126), 155.
Hicks v. Cleveland (48 N. Y. 84), 31.
Hicks v. Cram (17 Vt. 449), 271.
Hiddles v. Chicago & N. W. R. Co. (Wis., 46 N. W. Rep. 115), 394.
Hier v. Staples (51 N. Y. 136), 39.
Hielt v. Shull (36 W. Va. 563), 441.
Higgins v. Dewey (107 Mass. 494), 368.
Higgins v. Moore (34 N. Y. 425), 169.
Higgs v. Carlton & Scaggs (28 Md. 115), 360.
Higham v. Ridgeway (2 Smith's Lead. Cas. 318), 300.
Higham v. Stewart (38 Mich. 513), 451.
Highland Ave. & B. R. Co. v. Walters (Ala., 8 S. Rep. 357), 95.
Highland T. Co. v. McKean (10 Johns. 154), 319.
Highton v. Dessau (46 N. Y. State Rep. 922), 407.
Higley v. Bidwell (9 Conn. 447), 296.
Hill v. Burger (3 Bradf. 459), 260.
Hill v. C. F. Jewitt Pub. Co. (154 Mass. 172), 246.
Hill v. Chamberlain (30 Mich. 422), 262.
Hill v. Felton (46 Ga. 455; 15 Am. Rep. 643), 256.
Hill v. Mendenhall (21 Wall. 453), 32.
Hill v. Miller (50 Kan. 59), 235.
Hill v. North (34 Vt. 604), 277.
Hill v. Scott (38 Mo. App. 370), 423.
Hill v. Taylor (77 Tex. 295), 135.
Hill v. Whidden (158 Mass. 267), 180.
Hills v. Rix (Minn., 46 N. W. Rep. 297), 187.
Hilsley v. Palmer (82 Hun, 472), 401.
Hinckly v. Davis (6 N. H. 210), 111.

The references are to pages.

- Hindman v. Van Dyke (153 Pa. St. 243), 302.
- Hine v. Hine (39 Barb. 507), 257.
- Hine v. Manhattan R. Co. (132 N. Y. 477), 481.
- Hines v. Commonwealth (11 Ky. L. Rep. 865), 186.
- Hinkley v. Kersting (21 Ill. 247), 416.
- Hinton v. Locke (5 Hill, 437), 172.
- Hissary v. Richmond & D. R. Co. (91 Ala. 514), 165.
- Hitchcock v. Carpenter (9 Johns. 344), 28.
- Hitchings v. St. Louis, N. O. & O. C. & T. Co. (68 Hun, 33), 327.
- Hoag v. Greenwich (133 N. Y. 152), 420.
- Hoddy v. Osborn (9 Iowa, 517), 235.
- Hodgdon v. Wright (36 Me. 337), 453.
- Hodge v. State (Ala., 12 S. Rep. 164), 409.
- Hodges v. Hodges (106 N. C. 374), 283.
- Hodson v. Goodale (22 Oreg. 68), 198.
- Hoe v. Sanborn (21 N. Y. 552), 37.
- Hoffeditz v. Maiden Creek Iron Co. (141 Pa. St. 58), 213.
- Hoffman v. McFadden (56 Ark. 217), 263.
- Hoffman v. Treadwell (2 S. C. (T. & C.) 54), 263.
- Hoganspon v. Shirk (129 Ind. 352), 290.
- Hohn v. Kelly (34 Cal. 400), 420.
- Hoke v. Field (19 Am. Rep. 58), 266.
- Holbrook v. New Jersey Zinc Co. (57 N. Y. 616), 239.
- Holbrook v. School Trustees (28 Ill. 187), 131.
- Holcomb v. Holcomb (28 Conn. 177), 71.
- Holcomb v. Holcomb (95 N. Y. 316), 365.
- Holderness v. Baker (44 N. H. 414), 112.
- Holland v. Tenn. Coal & I. R. Co. (91 Ala. 444), 165.
- Holler v. Apa (43 N. Y. State Rep. 529), 393.
- Hollister v. Rizner (9 Ohio St. 1), 105.
- Holmes v. Goldsmith (147 U. S. 150), 6, 189.
- Holmes v. Green (1 Stark. 488), 113.
- Holmes v. Mead (52 N. Y. 332), 254.
- Holmes v. Moffat (120 N. Y. 159), 500.
- Holmes v. Roper (56 N. Y. State Rep. 596), 336.
- Holmes v. Turner's Falls L. Co. (15 Mass. 35), 329.
- Holt v. Kirby (57 Ark. 13), 232.
- Holtz v. State (76 Wis. 99), 351.
- Home Ins. Co. v. Baltimore Warehouse Co. (93 U. S. 527), 64.
- Home Ins. Co. v. Marple (1 Ind. App. 411), 458.
- Homer v. Guardian Mut. Life Ins. Co. (67 N. Y. 481), 191.
- Honegger v. Wettstein (94 N. Y. 252), 513.
- Hood v. Beauchamp (8 Sim. 29), 287.
- Hood v. Jones (5 Del. Ch. 77), 419.
- Hood v. Olin (80 Mich. 236), 10.
- Hook v. Kenyon (55 Hun, 598), 481.
- Hooker v. Chicago, M. & St. P. R. Co. (76 Wis. 542), 329.
- Hooker v. Eagle Bank (30 N. Y. 83, 86), 238, 245.
- Hooper v. Hooper (32 W. Va. 526), 78.
- Hope v. Beaden (17 Q. B. 209), 133.
- Hopkins v. Bowers (108 N. C. 298), 81.
- Hopkins v. Kent (17 Md. 113), 212.
- Hopkins v. Stuart (39 Minn. 90), 348.
- Hopper v. Justice (111 N. C. 418), 153.
- Horan v. Weiler (41 Pa. St. 470), 450.
- Hordin v. Kelly (Va., 15 S. W. Rep. 894), 186.
- Horn v. Keteltas (46 N. Y. 605), 200.
- Hornebeck v. American Bible Soc. (2 Sandf. Ch. 133), 255.
- Horner v. Horner (145 Pa. St. 258), 188.
- Horton v. Wood (66 Hun, 632; 50 N. Y. State Rep. 679), 300.
- Hoseley v. Black (28 N. Y. 438), 34.
- Hossack v. Moody (29 Ill. App. 17), 181.

The references are to pages.

- Hotaling v. Marsh (132 N. Y. 29; 43 N. Y. State Rep. 544), 252.
- Hotchkiss v. Artisans' Bank (42 Barb. 517), 161.
- Hotchkiss v. Germania F. Ins. Co. (5 Hun, 90), 7.
- Hotchkiss v. Lyons (2 Blackf. 222), 110.
- Houghton v. Carpenter (40 Vt. 588), 193.
- Houghton v. McAuliffe (2 Abb. Ct. App. Dec. 409), 240.
- Houlton v. Manteuffel (Minn., 53 N. W. Rep. 541), 96.
- House v. House (61 Mich. 69), 54.
- Houston v. Clark (50 N. H. 482), 264.
- Hover v. Missouri P. R. Co. (Mo., 16 S. W. Rep. 480), 427.
- Howard v. American Peace Soc. (49 Me. 297), 255.
- Howard v. Glenn (Ga., 11 S. E. Rep. 610), 316.
- Howard v. Hudson (2 E. & B. 1), 509.
- Howard v. McDonough (77 N. Y. 592), 309.
- Howard v. Upton (9 Hun, 434), 335.
- Howard v. Zempelman (Tex., 14 S. W. Rep. 59), 83, 393.
- Howe v. Hall (14 East, 276), 130.
- Howell v. Biddlecome (62 Barb. 181), 31.
- Howland v. Blake (97 U. S. 624), 372.
- Howland v. Union Theological Sem. (5 N. Y. 209), 308.
- Hoyt v. Newfold (45 N. J. L. 219), 442.
- Hoyt v. Thompson (5 N. Y. 335), 245.
- Hronek v. People (12 Crim. Law Mag. 1022), 68.
- Hubbard v. Greeley (84 Me. 340), 203.
- Hubbell v. Meigs (50 N. Y. 480), 321.
- Huckenstein v. Kelly & J. Co. (133 Pa. St. 201), 135.
- Hudson v. Carman (41 Me. 84), 318.
- Hudson v. Charleston C. & C. R. Co. (104 N. C. 491), 423.
- Hudson v. Hawser (123 Ind. 309), 477.
- Huff v. Bennett (6 N. Y. 337), 310.
- Hughes v. Hughes (87 Ala. 652), 212.
- Hukill v. Guffey (37 W. Va. 425), 208.
- Huling v. Huling (32 Ill. App. 519), 72.
- Hull v. Aplington (82 Iowa, 692), 410.
- Hull v. Augustine (23 Wis. 383), 106.
- Hull v. Cooper (36 Mo. App. 387), 213.
- Hullum v. Dickinson (54 Ark. 311), 420.
- Humphrey v. Robinson (52 Hun, 200), 258.
- Humphries v. Newport News & W. V. Co. (23 W. Va. 135), 423.
- Humphries v. N. Y., L. E. & W. R. Co. (121 N. Y. 436; 31 N. Y. State Rep. 299), 179.
- Hungerford v. Rosenstein (46 N. Y. State Rep. 195), 206.
- Hungerford Nat'l Bank v. Van Nostrand (106 Mass. 559), 243.
- Hunn v. Michigan C. R. Co. (78 Mich. 513), 137.
- Hunnicut v. State, Witt (75 Tex. 233), 137.
- Hunnum v. Belchertown (19 Pick. 311), 39.
- Hunscum v. Hunscum (15 Mass. 184), 68.
- Hunt v. Blackburn (128 U. S. 464), 59.
- Hunt v. Colorado Mill & E. Co. (1 Colo. App. 120), 274.
- Hunt v. Fisk (4 Barb. 324), 19.
- Hunt v. Hayes (Vt., 45 Alb. L. J. 414), 263.
- Hunt v. Johnson (19 N. Y. 279), 288.
- Hunt v. Ogdensburg & L. C. R. Co. (67 Hun, 556; 52 N. Y. State Rep. 799), 101.
- Hunter v. Boston (152 Mass. 168), 376.
- Hunter v. Gibbs (79 Wis. 70), 123.
- Hunter v. Harris (24 Ill. App. 637), 460.
- Hunter v. Harris (131 Ill. 482), 10, 314.
- Hunter v. Hudson River Iron Co. (20 Barb. 507), 245.
- Hunter v. Manhattan R. Co. (57 N. Y. State Rep. 400), 361.
- Hunter v. Manhattan R. Co. (141 N. Y. 281), 498.

The references are to pages.

Hunter v. N. Y., O. & W. R. Co. (116 N. Y. 615; 27 N. Y. State Rep. 727), 94, 102.
 Hunter v. State (30 Tex. App. 314), 346.
 Hunter v. State (40 N. J. L. 495), 346.
 Huntington v. Attrill (118 N. Y. 365), 485.
 Hurlburt v. Hurlburt (128 N. Y. 420; 40 N. Y. State Rep. 436), 55, 340.
 Hurley v. Lockett (72 Tex. 262), 329.
 Hursh v. North (40 Pa. St. 241), 166.
 Hussey v. State (87 Ala. 121), 11, 276.
 Hutchins v. Flintge (2 Tex. 473), 434.
 Hutchins v. Ford (82 Me. 363), 383.
 Hutchins v. Hefford (34 N. Y. 24), 143.
 Hutchins v. Hutchins (98 N. Y. 56, 64), 201, 351.
 Hyatt v. State, Drew County (Ark., 13 S. W. Rep. 215), 149.
 Hyde v. Hyde (3 Bradf. 509), 312.
 Hymen v. Schlenker (44 La. Ann. 108), 259.

I.

Ilfrey v. Sabine & E. S. R. Co. (76 Tex. 63), 379.
 Illinois C. R. Co. v. Blye (43 Ill. App. 612), 385.
 Illinois C. R. Co. v. Cregan (71 Ill. 184), 442.
 Illinois C. R. Co. v. Slater (139 Ill. 190), 363.
 Ingalls v. Averitt (34 Mo. App. 371), 329.
 Ingles v. State (61 Ind. 212), 94.
 Inland & S. C. Co. v. Tolson (139 U. S. 551), 383.
 Inman v. Potter (18 R. I. 79), 475.
 Insurance Co. v. Moseley (8 Wall. 397), 324.
 Insurance Co. v. Newton (22 Wall. 32), 118.
 Insurance Co. v. Rodel (95 U. S. 232, 239), 359.

International & G. N. R. Co. v. Kuehn (Tex., 21 S. W. Rep. 58), 361.
 Ireland v. Cincinnati, W. & M. R. Co. (79 Mich. 163), 364.
 Irvin v. Bevil (80 Tex. 332), 283.

J.

Jackson v. Bailey (2 Johns. 17), 314.
 Jackson v. Blodgett (5 Cow. 202), 238.
 Jackson v. Brooks (8 Wend. 626), 400.
 Jackson v. Clew (18 Johns. 347), 435.
 Jackson v. Denison (4 Wend. 558), 52.
 Jackson v. French (3 Wend. 337), 50.
 Jackson v. Halstead (5 Cow. 216), 121.
 Jackson v. Harder (4 Johns. 202), 460.
 Jackson v. Humphrey (1 Johns. 498), 49.
 Jackson v. King (5 Cow. 237), 448.
 Jackson v. Kingsley (17 Johns. 157), 121, 133.
 Jackson v. Kniffen (2 Johns. 35), 299.
 Jackson v. Luquere (5 Cow. 221), 293.
 Jackson v. McVey (18 Johns. 330), 52.
 Jackson v. Pool (91 Tenn. 448), 138.
 Jackson v. Powers (40 Vt. 611), 314.
 Jackson v. Shearman (6 Johns. 19), 133.
 Jackson v. State (52 Ala. 303), 345.
 Jackson v. Varick (7 Cow. 238), 19.
 Jackson Milling Co. v. Chandos (82 Wis. 437), 159.
 Jacksonville, T. & K. W. Co. v. Wellman (26 Fla. 344), 328.
 Jacob v. Lindsay (1 East, 460), 120.
 Jacobs v. Callagan (57 Mich. 11), 277.
 Jacobs v. Shenon (2 East, 1002), 187.
 Jacobs v. United States (1 Brock. 528), 428.
 James v. Ford (30 N. Y. State Rep. 667), 404.
 James v. James (81 Tex. 373), 455.
 James v. Sammis (132 N. Y. 239; 43 N. Y. State Rep. 910), 135.
 Jamison v. Indiana Natural Gas Co. (128 Ind. 555; 44 Alb. L. J. 145), 93.

The references are to pages.

- Jamison v. People (145 Ill. 357), 326.
 Jamison v. Weaver (84 Iowa, 611), 420.
 Jansen v. Siddal (41 Ill. App. 279), 450.
 Jarvis v. Sewell (40 Barb. 449), 32.
 Jay v. Carthage (48 Me. 353), 428.
 Jaycox v. Caldwell (51 N. Y. 395), 264.
 Jefferds v. Alvord (151 Mass. 94), 327.
 Jefferds v. People (5 Park. Cr. Rep. 522), 115.
 Jefferson v. N. Y. El. R. Co. (132 N. Y. 483), 362.
 Jeffery v. Walton (1 Stark. Rep. 385), 193.
 Jenkins v. Collard (145 U. S. 546), 89.
 Jenkins v. Davis (10 Q. B. 314), 287.
 Jenkins v. Monroe (61 Mich. 454), 158.
 Jennings v. Grand Trunk R. Co. (52 Hun, 227), 455.
 Jermain v. Denniston (6 N. Y. 276), 341.
 Jervis v. Berridge (L. R. 8 Ch. App. 351), 202.
 Jewell v. Center (25 Ala. 498), 91, 134.
 J. K. Armsby v. Eckerly (42 Mo. App. 299), 150.
 J. Oberman Brew. Co. v. Adams (35 Ill. App. 540), 355.
 Johnson v. Agricultural Ins. Co. (25 Hun, 251), 220.
 Johnson v. Beardslee (15 John. 3), 113.
 Johnson v. Castle (63 Vt. 452), 395.
 Johnson v. Common Council (16 Ind. 227), 91.
 Johnson v. Cowdrey (46 N. Y. State Rep. 546), 290.
 Johnson v. Cox (81 Ga. 25), 341.
 Johnson v. Daverne (19 Johns. 134), 402.
 Johnson v. Johnson (72 Ill. 491), 263.
 Johnson v. Johnson (80 Ga. 260), 352.
 Johnson v. Manhattan R. Co. (60 Hun, 583), 480.
 Johnson v. Northern P. R. Co. (1 N. D. 354), 427.
 Johnson v. Oppenheim (55 N. Y. 280), 197.
 Johnson v. People (3 Hill, 178), 17.
 Johnson v. Pembroke (11 East, 504), 284.
 Johnson v. Robertson (31 Md. 416), 96.
 Johnson v. State (76 Ga. 76), 70.
 Johnson v. State (87 Ga. 39), 348.
 Johnson v. St. Louis, I. M. & S. R. Co. (141 U. S. 602), 187.
 Johnson v. Washburn (Ala., 13 S. Rep. 48), 185.
 Johnson v. Willard (83 Wis. 420), 189.
 John Spry Lumber Co. v. The C. H. Green (76 Mich. 320), 424.
 Johnston v. Donovan (50 Hun, 215), 194.
 Johnston v. Patterson (86 Ga. 725), 150, 252.
 Jones v. Axon (1 Ld. Raym. 119), 27.
 Jones v. Chicago, St. P., M. & O. R. Co. (Minn., 45 N. W. Rep. 444), 377.
 Jones v. Dana (24 Barb. 398-402), 241.
 Jones v. East Soc. etc. (21 Barb. 174), 340.
 Jones v. Gilbert (135 Ill. 27), 261.
 Jones v. Hays (4 McLean, 521), 99.
 Jones v. Hurlburt (39 Barb. 403), 269.
 Jones v. Jones (43 N. Y. State Rep. 434), 441.
 Jones v. Jones (137 N. Y. 610), 336.
 Jones v. Layman (123 Ind. 569), 323.
 Jones v. Lee (77 Mich. 35), 407.
 Jones v. Maffit (5 S. & R. 523), 360.
 Jones v. Minibach (26 Tex. 235), 417.
 Jones v. Morgan (90 N. Y. 4), 482.
 Jones v. Portland (88 Mich. 598), 330.
 Jones v. Rigby (41 Minn. 530), 323.
 Jones v. Roberts (37 Mo. App. 163), 355.
 Jones v. State (71 Ind. 66), 299.
 Jones v. United States (137 U. S. 202), 97.
 Jones v. Utica & B. R. R. Co. (40 Hun, 349), 365.
 Jordan v. Welkins (2 Wash. C. C. 482), 134.

The references are to pages.

Joseph v. Southwork F. & M. Co. (10 S. Rep. 327), 274.
 Jourdan v. Long Island R. Co. (115 N. Y. 238; 26 N. Y. State Rep. 138), 245.
 Joy v. Defendorff (130 N. Y. 6), 432.
 Joy v. State (14 Ind. 139), 22.
 Joyner v. South Carolina R. Co. (26 S. C. 49), 424.
 Juda v. Johnson (2 Ind. 371), 22.
 Judd v. Claremont (N. H., 23 Atl. Rep. 427), 15.
 Judson v. Easton (51 N. Y. 664), 379.
 Juilliard v. Chaffee (92 N. Y. 529), 203.

K.

Kain v. Larkin (131 N. Y. 300), 138, 228.
 Kaiser v. Kaiser (16 Hun, 602), 28.
 Kane v. Torbitt (23 Ill. App. 311), 340.
 Kansas City, Ft. S. & M. R. Co. v. Cook (57 Ark. 127), 381.
 Kansas City, Ft. S. & M. R. Co. v. Stoner (49 Fed. Rep. 209), 331.
 Kansas City, Ft. S. & M. R. Co. v. Stoner (51 Fed. Rep. 649), 398.
 Kansas City, M. & B. R. Co. v. Phillips (Ala., 12 S. Rep. 65), 96.
 Kansas P. R. Co. v. Miller (2 Cal. 443), 447.
 Karney v. Paisley (13 Iowa, 89), 75.
 Kaserman v. Friers (33 Neb. 427), 187.
 Kauffman v. Maier (94 Cal. 269), 390.
 Kavanaugh v. Wilson (70 N. Y. 177), 487.
 Kean v. Klausman (21 Mo. App. 485), 88.
 Keeler v. Salisbury (33 N. Y. 648), 393.
 Keene v. Mead (3 Pet. 1, 7), 144.
 Keenan, Matter of (56 N. Y. State Rep. 136), 7.
 Keener v. State (18 Ga. 194), 16.
 Keener v. Zartman (144 Pa. St. 179), 80.
 Kehler v. Schwenk (151 Pa. St. 505), 384.
 Kehoe v. Corville (84 Iowa, 415), 319.
 Keidan v. Winegar (95 Mich. 430), 152.
 Keller v. Ford (Pa., 20 Atl. Rep. 25), 410.
 Keller v. Paine (34 Hun, 167), 373.
 Keller v. Phillips (39 N. Y. 351), 266.
 Kelley v. Mayberry Tp. (154 Pa. St. 440), 474.
 Kelley v. Owens (Cal., 30 Pac. Rep. 596), 235.
 Kelley v. People (55 N. Y. 565), 106.
 Kellogg v. Clyne (54 Fed. Rep. 696), 226.
 Kelly v. Calhoun (17 Alb. L. J. 55), 245.
 Kelly v. Campbell (2 Abb. Ct. App. Dec. 492), 264.
 Kelly v. Detroit, L. & H. R. Co. (80 Mich. 236), 343.
 Kelly v. Drew (12 Allen, 107), 262.
 Kelly v. Leachman (Idaho, 33 Pac. Rep. 44), 153.
 Kelly v. Scott (49 N. Y. 601), 271.
 Kelsea v. Fletcher (48 N. H. 282), 312.
 Kendall v. Freeman (2 McLean, 189), 38.
 Kennebec Sav. Bank v. Fogg (83 Me. 374), 151.
 Kennedy v. Atwater (77 Pa. St. 34), 274.
 Kennedy v. Cotton (28 Barb. 59), 239.
 Kennedy v. Ryall (67 N. Y. 386), 258.
 Kennedy v. Selleck (21 N. Y. Week. Dig. 72), 407.
 Kennedy v. The Rochester City & B. R. Co. (130 N. Y. 654), 333.
 Kennedy v. Wood (52 Hun, 46), 227.
 Kenney v. Folkerts (Mich., 44 N. W. Rep. 152), 108.
 Kenney v. Planer (3 Daly, 131), 29.
 Kenosha Store Co. v. Shedd (82 Iowa, 540), 435.
 Kent v. Kent (62 N. Y. 560), 250.
 Keotler v. Manhattan El. R. Co. (36 N. Y. State Rep. 611), 329.
 Keough v. McNitt (6 Minn. 513), 196.
 Kermans v. Bahan (45 La. Ann. 96), 129.

The references are to pages.

- Kerr v. Hayes (35 N. Y. 331), 508.
 Kerrians v. People (60 N. Y. 221), 227.
 Kessler v. Smith (42 Minn. 494), 147.
 Key v. Dent (14 Md. 86), 506.
 Keyes v. State (122 Ind. 527), 140, 342.
 Keyser v. Hitz (133 U. S. 138), 97.
 Kidder v. Blaisdall (45 Me. 461), 95, 131.
 Kidder v. Norris (18 N. H. 532), 450.
 Kidder v. Stevens (60 Cal. 415), 437.
 Kilbourne v. Sullivan County (137 N. Y. 170), 231.
 Killebrew v. Carlisle (Ala., 12 S. Rep. 167), 213.
 Kilpatrick v. Commonwealth (31 Pa. St. 198), 297.
 Kincaid v. Archibald (73 N. Y. 189), 217.
 Kinck v. Kinck (75 Va. 12), 154.
 King v. Bryan (2 Stark. 1101), 27.
 King v. Donohue (110 Mass. 155), 402.
 King v. Fitch (2 Abb. Ct. App. Dec. 508), 246.
 King v. Kelly (28 Ind. 89), 430.
 King v. Richards (6 Whart. 418), 510.
 King v. State (55 Ark. 604), 23.
 King v. State (91 Tenn. 617), 232.
 Kingman, P. & W. R. Co. v. Quinn (45 Kan. 477), 8.
 Kingsbury v. Moses (45 N. H. 222), 199.
 Kingsland v. Koeppe (35 Ill. App. 81), 189.
 Kingsland v. New York (60 Hun, 489), 376.
 Kingsley v. Sampson (100 Ill. 573), 109.
 Kinsman v. Parkhurst (18 How. (U.S.) 289), 510.
 Kintzel v. Kintzel (133 Pa. St. 71), 354.
 Kirby v. State (89 Ala. 63), 106.
 Kirby v. Territory (Ariz., 28 Pac. Rep. 1134), 343.
 Kirchner v. Loughfin (Kan., 28 Pac. Rep. 505), 132.
 Kirchner v. New Home Sewing Mach. Co. (135 N. Y. 182), 181.
 Kirchner v. Venus (12 Moore's Priv. Coun. Cas. 361), 169.
 Kirschner v. State (9 Wis. 140), 44.
 Kissam v. Roberts (6 Bosw. 154), 29.
 Kleimann v. Geiselmann (45 Mo. App. 497), 131.
 Klein v. Hoffheimer (132 U. S. 367), 353.
 Kline v. Bank of Trescott (50 Kan. 91), 152.
 Kling v. Kansas City (27 Mo. App. 231), 56.
 Knabe v. Burden (88 Ala. 436), 98.
 Knapp v. Gregory (65 Hun, 621), 180.
 Knapp v. Knapp (95 Mich. 474), 223.
 Knapp v. Marlboro (29 Vt. 282), 163.
 Knapp v. Roche (37 N. Y. Supr. Ct. 395), 31.
 Knapp v. Simon (96 N. Y. 284), 25.
 Knaus v. Dudgeon (110 Mo. 58), 273.
 Kniffen v. McConnell (30 N. Y. 289), 490.
 Knight v. Cunningham (6 Hun, 100), 305.
 Knight v. Jackson (36 S. C. 10), 68.
 Knight v. McKinney (84 Me. 107), 451.
 Knight v. Richter (11 Mont. 74), 316.
 Knower v. Central Nat. Bank (124 N. Y. 552), 435.
 Knowles v. Dow (22 N. H. (2 Fost.) 403), 161.
 Knowlton v. Mickles (29 Barb. 465), 32.
 Knox v. Columbia Liberty Iron Co. (42 Fed. Rep. 378), 87.
 Knox v. Silloway (1 Fairchild (Me.), 201), 69.
 Knox County v. N. Y. N. Nat. Bank (147 U. S. 91), 326.
 Kock v. Bonitz (4 Daly, 117), 29.
 Kock v. Lyon (82 Mich. 513), 342.
 Koehler v. Miller (21 Ill. App. 557), 329.
 Koehler v. Scheider (31 N. Y. State Rep. 549), 314.
 Kohler v. Lindenmeyer (129 N. Y. 498), 306.

The references are to pages.

- Kolb v. Sandwich Enterprise Co. (36 Ill. App. 419), 497.
- Kollock v. Emmert (43 Mo. App. 566), 455.
- Koontz v. Oregon R. & Nav. Co. (Oreg., 43 Am. & Eng. R. Cas. 11), 424.
- Korneman v. Fred Hower Brew. Co. (53 N. Y. State Rep. 450), 180.
- Kortlander v. Elston (52 Fed. Rep. 180), 231.
- Kraatz v. Brush Elec. Light Co. (82 Mich. 457), 376.
- Kraemer v. Adelsberger (122 N. Y. 467), 459.
- Kreiter v. Nichols (28 Mich. 500), 216.
- Krekeler v. Ritter (62 N. Y. 372), 27, 507.
- Krekstall Brew. v. Furness R. (L. R. 9 Q. B. 468), 97.
- Krenzberger v. Wingfield (96 Cal. 251), 209.
- Kritchner v. Hard (32 Pac. Rep. 418), 157.
- Krom v. Levy (1 Hun, 173), 306.
- Kuellak v. Beck (47 Hun, 117), 129.
- Kuhn v. Schwartz (33 Mo. App. 610), 131.
- Kummer v. Christopher & T. Street R. Co. (46 N. Y. State Rep. 386), 11.
- L.**
- Laboree v. Klosterman (33 Neb. 150), 308.
- La Champagne (53 Fed. Rep. 398), 482.
- Lacroix v. Sarrazzin (15 Fed. Rep. 489), 92.
- Lafayette Mut. Bldg. Ass'n v. Kleinhoffer (40 Mo. App. 388), 314.
- Lahey v. Ottman & Co. (73 Hun, 61), 326.
- Laing v. United N. J. R. & C. Co. (54 N. J. L. 576), 357.
- Lake v. Nolan (81 Mich. 112), 487.
- Lake v. Tysen (6 N. Y. 461), 452.
- Lake Erie & W. R. Co. v. Carson (4 Ind. App. 185), 439.
- Lake Erie & W. R. Co. v. Wills (39 Ill. App. 649), 395.
- Lakeside Land Co. v. Dromegoole (Ala., 9 S. Rep. 444), 189.
- Lally v. Emery (54 Hun, 517), 392.
- Lally v. Emery (59 Hun, 273), 227.
- Lambert v. Seely (17 How. Pr. 432), 236.
- Lamson Con. Store Ser. Co. v. Hartung (46 N. Y. State Rep. 191), 206.
- Lancaster v. Blaney (140 Ill. 203), 80.
- Lancaster v. Washington Life Ins. Co. (63 Mo. 127), 145.
- Lancaster Mills v. Merchants' Cotton Press & S. Co. (89 Tenn. 1), 142.
- Lanci's Appeal (112 Pa. St. 467), 200.
- Landers v. Cooper (115 N. Y. 279), 150, 254.
- Lane v. Union Nat. Bank (3 Ind. App. 299), 252.
- Langdon v. Astor (16 N. Y. 9), 257.
- Langlois v. Crawford (59 Mo. 456), 149.
- Langworthy v. Green Tp. (88 Mich. 207), 379.
- Lanier v. Faust (81 Tex. 186), 179.
- Lanigan v. Bradley, etc. Co. (N. J. Ch., 50 N. J. Eq. 201), 238.
- Larocque v. Harvey (57 Hun, 366), 207.
- Larue v. Rowland (7 Barb. 107), 306.
- La Rue v. St. Anthony & D. E. Co. (S. D., 54 N. W. Rep. 806), 326.
- Lasatere v. Van Hook (77 Tex. 650), 136.
- Lasher v. State (30 Tex. App. 389), 98.
- Lassone v. Boston & L. R. Co. (N. H., 46 Alb. L. J. 273), 301.
- Laughlin v. Grand Rapids R. Co. (Mich., 44 N. W. Rep. 1049), 343.
- Lavretta v. Holcombe (Ala., 12 S. Rep. 789), 130.
- Law v. Mumma (43 Pa. St. 267), 294.
- Law v. Smith (2 R. I. 244), 251.
- Lawrence v. Hunt (10 Wend. 81), 507.
- Lawrence v. Hyman (79 N. C. 209), 195.

The references are to pages.

- | | |
|--|--|
| Lawrence v. Lindsay (68 N. Y. 108), 251. | Leonard v. Smith (34 W. Va. 442), 419. |
| Lawrence v. Phipps (67 Hun, 61), 205. | Leonard v. Southern P. Co. (21 Oreg. 555), 138. |
| Lawson v. Conaway (37 W. Va. 159), 12, 399. | Leonardsville Bank v. Willard (25 N. Y. 574), 242. |
| Lawson v. State (20 Ala. 65), 106. | Letier v. Oskaloosa (41 Iowa, 353), 91. |
| Lay Grae v. Peterson (2 Sandf. 338), 75. | Levy v. State (6 Ind. 281), 88. |
| Lazarus v. McQuirk (42 La. Ann. 194), 207. | Levy v. State (28 Tex. App. 203), 138. |
| Lazarus v. Metropolitan El. R. Co. (69 Hun, 190), 488. | Lewis v. Duane (69 Hun, 28), 326. |
| Lazier v. Wescott (26 N. Y. 146), 90. | Lewis v. Flock (31 N. Y. State Rep. 282), 353. |
| Lazoin v. Orleans Nav. Co. (7 La. Ann. 682), 117. | Lewis v. Harris (31 Ala. 689), 95. |
| Leach v. Bancroft (61 N. H. 411), 295. | Lewis v. Marshall (5 Pet. 470), 287. |
| Leach v. Beardslee (22 Conn. 404), 173. | Lewis v. Rice (61 Mich. 97), 354. |
| Leachman v. Dougherty (81 Ill. 324), 267. | Lewis v. State (Ala., 11 S. Rep. 259), 390. |
| Leahy v. Rayburn (33 Mo. App. 55), 81. | Lewis v. Thatcher (15 Mass. 433), 166. |
| Learned v. Corley (43 Miss. 709), 445. | Lewis v. Woodworth (2 N. Y. 513), 269. |
| Learned v. Tillotson (97 N. Y. 12), 108. | Lewiston, etc. Co. v. Androscoggin Water P. Co. (78 Me. 274), 375. |
| Leavenworth v. Brockway (2 Hill, 201), 456. | Liddle v. Sahline (55 Ark. 627), 194. |
| Lee v. State (74 Wis. 45), 306. | Lidgengren Furniture Co. v. Mead (Minn., 44 N. W. Rep. 306), 147. |
| Leedom v. Lombart (80 Pa. St. 381), 417. | Liggett v. Glenn (51 Fed. Rep. 381), 318. |
| Leeds v. Cook (4 East, 256), 132. | Lilienthal v. Suffolk Brew. Co. (154 Mass. 185), 203. |
| Leeser v. Bookhoff (38 Mo. App. 445), 313. | Linch v. Paris Lumber & G. El. Co. (80 Tex. 23), 384. |
| Lefever v. Lefever (59 N. Y. 434), 254. | Linck v. Litchfield (Ill., 31 N. E. Rep. 123), 99. |
| Lefler v. Field (52 N. Y. 621), 31. | Lincoln v. Claffin (7 Wall. 132), 12. |
| Leggett v. Harding (10 Ind. 414), 195. | Lincoln v. Craig (16 R. I. 18), 271. |
| Leggett v. Tullervey (14 Ex. 301), 506. | Lincoln v. Smith (Neb., 45 N. W. Rep. 41), 137, 315. |
| Legrange v. Chapman (11 Mich. 499), 94. | Lincoln v. Unexcelled Fireworks Co. (128 N. Y. 672), 11. |
| Lehman v. Tallahassee Mfg. Co. (63 Ala. 567), 432. | Lindauer v. Meyberg (27 Mo. App. 181), 323. |
| Lemon v. Chicago & G. T. Co. (59 Mich. 618), 136. | Lindsey v. Attorney-General (33 Miss. 508), 96. |
| Lennon v. Rewitzer (57 Conn. 583), 423. | Lindsley v. Lovely (26 Vt. 123), 193. |
| Leonard v. Bolton (148 Mass. 66), 343. | Link v. Sheldon (136 N. Y. 1), 331. |
| Leonard v. Columbia S. N. Co. (84 N. Y. 53), 223. | Linnell v. Southerland (11 Wend. 568), 306. |
| | Lipe v. Becker (1 Denio, 568), 32. |

The references are to pages.

- Lipscomb v. Lipscomb (32 S. C. 243), 204.
- Litch v. Clinch (136 Ill. 410), 249.
- Little v. Brooks (Hill & Denio Supp. 36), 198.
- Little v. Knox (Ala., 11 S. Rep. 443), 235.
- Little v. Palister (4 Me. 209), 288.
- Little Rock & Ft. S. R. Co. v. Bruce (55 Ark. 65), 378.
- Little Rock & M. R. Co. v. Shoecraft (56 Ark. 465), 384.
- Livingston's Appeal (Conn., 26 Atl. Rep. 470), 235.
- Livingston v. Arnoux (56 N. Y. 507), 308.
- Livingston v. Hall (73 Md. 386), 460.
- Livingston v. Kiersted (10 Johns. 362), 71.
- Lockwood v. Rose (125 Ind. 588), 329.
- Loder v. Whelpley (111 N. Y. 239), 51, 57.
- Logan v. Berkshire Apart. Ass'n (52 N. Y. State Rep. 132), 13.
- Logan v. United States (144 U. S. 263), 72, 350.
- Logan v. Wabash W. R. Co. (43 Mo. App. 71), 427.
- Lolanberger v. Gilbert (14 Va. L. J. 406), 127.
- Lonergan v. Buford (148 U. S. 581; 47 Alb. L. J. 454), 153.
- Long v. Davis (18 Ala. 801), 198.
- Long v. Drew (114 Mass. 77), 133.
- Long v. J. K. Armsby Co. (43 Mo. App. 253), 149.
- Lonsdale v. Brown (4 Wash. C. C. 86), 218.
- Loomis v. Wadhams (8 Gray, 557), 120.
- Loos v. Wilkinson (110 N. Y. 195), 337.
- Loper v. Welch (3 Duer, 644), 39.
- Lopez v. State (30 Tex. 487), 72.
- Lorillard v. Clyde (122 N. Y. 41, 46), 206.
- Louder v. Schluter (78 Tex. 103), 284.
- Loudin v. Walpole (1 Ind. 321), 447.
- Louisville Banking Co. v. Leonard (11 Ky. L. Rep. 917), 204.
- Louisville, E. & St. L. R. Co. v. Hart (2 Ind. App. 130), 10.
- Louisville, N. A. & C. R. Co. v. Cox (30 Ill. App. 380), 477.
- Louisville, N. A. & C. R. Co. v. Hendricks (128 Ind. 462), 380.
- Louisville, N. A. & C. R. Co. v. Nichols (Ind., 45 Alb. L. J. 412), 426.
- Louisville, N. A. & C. R. Co. v. Stoumel (126 Ind. 35), 426.
- Louisville, N. A. & C. R. Co. v. Taylor (126 Ind. 126), 424.
- Louisville & N. R. Co. v. Boland (Ala., 53 Am. & Eng. R. Cas. 169), 101.
- Louisville & N. R. Co. v. Manchester Mills (88 Tenn. 653), 165, 427.
- Louisville & N. R. Co. v. Watson (90 Ala. 68), 380.
- Louisville & N. R. Co. v. Wynne (88 Tenn. 320), 427.
- Lovegrove v. State (31 Tex. Crim. Rep. 491), 300.
- Lovejoy v. Chapman (Oreg., 32 Pac. Rep. 687), 205.
- Lovejoy v. Spafford (93 U. S. 430), 274.
- Loveless v. Manhattan R. Co. (5 N. Y. Supp. 185), 376.
- Low v. State (Tex., 20 S. W. Rep. 366), 505.
- Lowe v. Faulke (103 Ill. 58), 442.
- Lowe v. Greenwood (30 Ill. App. 184), 8.
- Lowe v. Mitchell (18 Me. 372), 44.
- Lowe v. State (88 Ala. 8), 116.
- Lowell Mfg. Co. v. Safeguard F. Ins. Co. (88 N. Y. 599), 209.
- Lowenstein v. Aaron (69 Miss. 341), 29.
- Lowenstein v. Salinger (62 Hun, 622), 455.
- Lowman v. Sheets (124 Ind. 416), 329.
- Lowry v. Hatley (30 Ill. App. 297), 460.

The references are to pages.

- Lowry v. Robinson (141 Pa. St. 189), 453.
- Loyd v. State (70 Miss. 251), 325.
- Loyd v. State (7 Tex. 215), 44.
- Lucas v. Brooks (18 Wall. 436), 67.
- Lucas v. Detroit City R. Co. (92 Mich. 412), 396.
- Luce v. Dorchester Mut. F. Ins. Co. (105 Mass. 297), 368.
- Luco v. De Toro (91 Cal. 405), 384.
- Ludlum v. Ludlum (26 N. Y. 363), 258.
- Lumpkin v. Murrell (46 Tex. 51), 95.
- Luna v. Mohr (3 N. M. 56), 151.
- Lund v. Lund (1 N. H. 39), 496.
- Lund v. Tynsborough (9 Cush. 36), 324.
- Luper v. Field (52 N. Y. 621), 38.
- Lustig v. N. Y., L. E. & W. R. Co. (65 Hun, 548; 48 N. Y. State Rep. 916), 385.
- Lutterloh v. McIlhenny (74 Tex. 73), 273.
- Lutz v. Compton (77 Wis. 587), 282.
- Lycoming Mut. Ins. Co. v. Sailor (67 Pa. St. 108), 149.
- Lyman v. Boston & M. R. Co. (N. H., 20 Atl. Rep. 976), 425.
- Lynch v. Doran (95 Mich. 395), 388.
- Lynch v. People (16 Mich. 472), 100.
- Lyndsay v. Connecticut & Pass. River R. Co. (27 Vt. 643), 422.
- Lyne v. Sandford (82 Tex. 58), 420.
- Lyon v. Prouty (154 Mass. 488), 61.
- Lyon v. Ricker (56 N. Y. State Rep. 804), 301.
- M.**
- McAfee v. State (85 Ga. 438), 120.
- McAteer v. McAteer (31 S. C. 313), 175.
- McCaldine v. Park (52 N. Y. State Rep. 746), 385.
- McCarragher v. Rogers (120 N. Y. 526), 8, 14, 383.
- McCartee v. Camel (1 Barb. Ch. 455), 444.
- McCarthy v. Gallagher (53 N. Y. State Rep. 176), 13, 22.
- McCarthy v. Wells (51 Hun, 171), 375.
- McCarthy, Matter of (55 Hun, 7), 80.
- McCarthy's Will (48 N. Y. State Rep. 315), 96.
- McCarthy's Will (38 N. Y. State Rep. 124), 84.
- McCasker v. Ensign (64 Vt. 488), 14.
- McCauley v. Murphy (86 Ga. 475), 393.
- McClain v. Brooklyn City R. Co. (116 N. Y. 459), 363.
- McClanahan v. McClanahan (36 W. Va. 34), 250.
- McClasky v. Maroney (87 Ala. 563), 136.
- McCleneghan v. Reid (34 Neb. 472), 14.
- McCole v. Loehr (79 N. Y. 432), 228.
- McCloskey v. McCormick (37 Ill. App. 66), 193.
- McClintock v. Hughes Bros. Mfg. Co. (Tex., 15 S. W. Rep. 200), 151.
- McConnell v. Osage (Iowa, 45 N. W. Rep. 550), 59.
- McCormack v. Perry (47 Hun, 71), 227.
- McCormick v. Barnum (10 Wend. 105), 296.
- McCormick v. Pennsylvania C. R. Co. (49 N. Y. 303), 310.
- McCormick v. Sarson (38 How. Pr. 190), 36.
- McCormick v. Smith (127 Ind. 230), 408.
- McCoy v. Cortice (9 Wend. 17), 97.
- McCoy v. Galloway (3 Ohio St. 282), 296.
- McCrary v. Jones (36 S. C. 136), 305.
- McCue v. Knoxville (146 Pa. St. 480), 397.
- McCullom v. Seward (62 N. Y. 316), 367.
- MacCulsky v. Klosterman (20 Oreg. 108), 46.
- McDade v. Mead (18 Ala. 217), 122.
- McDaniel v. State (8 Smedes & M. 401), 16.

The references are to pages.

- McDermott v. Hannibal & St. J. R. Co. (73 Mo. 516), 345.
- McDermott v. Hoffman (70 Pa. St. 32), 112.
- McDermott v. Third Ave. R. Co. (44 Hun, 107), 366.
- McDonald's Appeal (147 Pa. St. 527), 418.
- McDonald v. Hannah (51 Fed. Rep. 73), 207.
- McDonald v. Lane (80 Ga. 497), 88.
- McDonald v. Mallory (77 N. Y. 546), 223.
- McDonald v. Nelson (2 Cow. 139), 417.
- McDonald v. State (127 N. Y. 18), 383.
- McDonnell v. Ford (87 Mich. 198), 165.
- McDonough v. O'Neil (113 Mass. 97), 436.
- McDuff v. Detroit Eve. Jour. Co. (84 Mich. 1), 119.
- McDuffie v. Clark (39 Hun, 170), 317.
- McElwee Mfg. Co. v. Trowbridge (68 Hun, 28), 326.
- McFadden v. Kingsbury (11 Wend. 667), 216.
- McFadden v. State (28 Tex. App. 241), 351.
- McFarlan v. Triton Ins. Co. (4 Denio, 392), 316.
- McGrau v. Manhattan R. Co. (117 N. Y. 219), 476.
- McGeragle v. Broemel (53 N. J. L. 52), 176.
- McGinness v. Adriatic Mills (116 Mass. 117), 246.
- McGinnis v. State (24 Ind. 500), 95.
- McGinty v. Henderson (41 La. Ann. 332), 137.
- McGlove v. Prosser (21 Wis. 273), 100.
- McGoldrick v. Willets (52 N. Y. 612), 25.
- McGree v. Craven (106 N. C. 351), 175.
- McGregor v. Cleveland (5 Wend. 475), 270.
- McGregor v. Wait (10 Gray, 72), 121.
- McGuff v. State (88 Ala. 147), 70.
- McGuire v. Joslyn (57 Hun, 586), 437.
- McHarry v. Eastman 7 Robt. (N. Y.) 137), 101.
- McHorn v. Wheeler (45 Pa. St. 32), 316.
- McHugh v. Doud (86 Mich. 412), 78.
- McHugh v. Gallagher (1 Tex. Civ. App. 196), 157.
- McIlhargy v. Chambers (117 N. Y. 532), 306.
- McInery v. Irvin (90 Ala. 275), 459.
- McIntosh v. Lee (57 Iowa, 356), 92.
- McKay v. Armstrong (84 Tex. 159), 135.
- McKay v. Lasher (121 N. Y. 477), 135.
- McKee v. Nelson (4 Cow. 355), 215.
- McKeltor v. State (88 Ala. 181), 70.
- McKenzie v. Harrison (120 N. Y. 260), 239.
- McKey v. Riley (135 Ill. 586), 250.
- McKinney v. Grand St. R. Co. (104 N. Y. 352), 59.
- McKinney v. State (29 Fla. 565), 450.
- McKinnon v. Bliss (21 N. Y. 206), 91, 279.
- McKown v. Hunter (30 N. Y. 625), 227.
- McKyring v. Bull (16 N. Y. 297), 29.
- McLaughlin v. Webster (141 N. Y. 76), 96.
- McLean v. Ellis (79 Tex. 398), 204, 358.
- McLean v. Hertzog (6 S. & R. 154), 132.
- McLean v. Nichols (Minn., 45 N. W. Rep. 15), 187.
- McLean v. Schuyler S. T. Line (52 Hun, 43), 364.
- McLemon v. Longfellow (32 Me. 494), 50.
- McLemon v. Powell (32 S. C. 582), 354.
- McMillen v. Baxley (112 N. C. 578), 130.
- McMinn v. Whelan (27 Cal. 300), 448.
- McMullen v. Carson (48 Kan. 263), 206.
- McMurray v. McMurray (63 Hun, 483), 82.

The references are to pages.

- | | |
|---|---|
| McMurrin v. Regley (Iowa, 45 N. W. Rep. 877), 138. | Manchester v. Tibbetts (121 N. Y. 219), 419. |
| McNally v. Colwell (91 Mich. 527), 382. | Mandeville v. Reynolds (68 N. Y. 528), 32, 508. |
| McNeel v. Auldrige (34 W. Va. 748), 204. | Mandeville v. Welch (5 Wheat. 277), 104. |
| McNeil v. Hammond (87 Ga. 618), 251. | Mann v. Fairchilds (3 Abb. Ct. App. Dec. 152), 239. |
| McNutt's Appeal (Pa., 19 Atl. Rep. 936), 63. | Mann v. Mann (1 Johns. Ch. 231), 252. |
| McPherson v. Rathbone (7 Wend. 216), 132. | Mann v. Mann (43 L. J. (C. P.) 241), 195. |
| McPherson v. Weston (85 Cal. 90), 189. | Mann v. Palmer (2 Abb. Ct. App. Dec. 162), 28. |
| McVey v. Darkin (136 Pa. St. 418), 282. | Mann v. Snow (56 Hun, 647), 123. |
| Machin v. Lamar F. Ins. Co. (90 N. Y. 689), 370. | Mann v. State (23 Fla. 610), 364. |
| Macomb v. Wilkinson (83 Mich. 486), 179. | Mann v. Taylor (78 Iowa, 355), 390. |
| Macon & B. R. Co. v. Stump (Ga., 43 Am. & Eng. R. Cas. 318), 129. | Mann Boudoir Car Co. v. Dupre (54 Fed. Rep. 646), 101, 199. |
| Madden v. Missouri P. R. Co. (50 Mo. App. 666), 385. | Manning v. Den (Cal., 24 Pac. Rep. 1092), 368. |
| Maddox v. Maddox (Mo., 21 S. W. Rep. 499), 235. | Manning v. Gasparie (27 Ind. 399), 94. |
| Madison v. N. Y. C. R. Co. (35 N. Y. 487), 330. | Manning v. Maas (50 N. Y. State Rep. 759), 474. |
| Maghee v. Camden & A. R. Co. (45 N. Y. 514), 94. | Manning v. Maroney (87 Ala. 563), 136. |
| Magie v. Herman (Minn., 52 N. W. Rep. 909), 132. | Manning v. Tyler (21 N. Y. 567), 30. |
| Mahaska v. Ingalls (16 Iowa, 81), 112. | Manning v. Weeks (139 U. S. 504), 267. |
| Maher v. Hibernia Ins. Co. (67 N. Y. 183), 32. | Manning v. Winter (7 Hun, 482), 36. |
| Maher v. Manhattan R. Co. (53 Hun, 506), 428. | Marbury v. Madison (1 Cranch, 144), 49, 60. |
| Maines v. Henry (Ala., 11 S. Rep. 410), 186. | March v. Harrell (1 Jones' L. (N. C.) 329), 18. |
| Malcolm v. Fuller (152 Mass. 160), 965. | Marchand v. Griffin (140 U. S. 516), 179. |
| Mallory v. Ohio Farmers' Ins. Co. (90 Mich. 112), 404. | Marclay v. Shults (29 N. Y. 346, 351), 308. |
| Maloney v. Woodin (11 Hun, 202), 247. | Markle v. Akron (14 Ohio St. 586), 215. |
| Manchester v. Massachusetts (139 U. S. 240), 223. | Marmet Co. v. Archibald (37 W. Va. 778), 153. |
| | Marrow v. Brinkley (85 Va. 55), 207. |
| | Marrow v. Com. (48 Pa. St. 305), 132. |
| | Marsh v. McNair (99 N. Y. 74), 201. |
| | Marsh v. Richardson (106 N. C. 539), 249. |

The references are to pages.

- Marshall v. Bingle (36 Mo. App. 122), 364.
 Marshall v. Oakes (51 Me. 309), 451.
 Marston v. Butler (3 Wend. 149), 451.
 Marston v. Downs (1 A. & E. 31), 128.
 Marston v. Swett (66 N. Y. 206), 32.
 Martin v. Cooper (87 Cal. 97), 131.
 Martin v. Fox (40 Mo. App. 694), 43.
 Martin v. Hillen (58 N. Y. State Rep. 618), 49.
 Martin v. Jones (59 Mo. 187), 249.
 Martin v. N. Y., N. H. & H. R. R. Co. (103 N. Y. 626), 326.
 Martin v. Pycroft (2 De G., M. & G. 785), 202.
 Martin v. State (90 Ala. 602), 383.
 Marx v. Manhattan R. Co. (56 Hun, 575), 58.
 Maryland v. B. & O. R. Co. (22 Wall. 105), 148.
 Mary Lee Coal & R. Co. v. Chambliss (53 Am. & Eng. R. Cas. 254), 137.
 Masness v. German Am. Ins. Co. (Minn., 52 N. W. Rep. 932), 95.
 Mason v. Breslin (40 How. Pr. 436), 272.
 Mason v. Fuller (45 Vt. 29), 284.
 Mason v. McCormick (85 N. C. 226), 296.
 Mason v. Richmond & D. R. Co. (111 N. C. 482), 102.
 Mason, Matter of (60 Hun, 46), 21.
 Masonic Temple Ass'n v. Channell (Minn., 45 N. W. Rep. 716), 204.
 Masters v. Noy (123 N. Y. 628), 8, 14.
 Masterson v. Le Clair (4 Minn. 163), 97.
 Mather v. Parsons (32 Hun, 338), 365.
 Matteson v. N. Y. C. R. Co. (35 N. Y. 487), 342.
 Matthews v. Dubuque Mattress Co. (Iowa, 54 N. W. Rep. 225), 152.
 Matthews v. Hoagland (48 N. J. Eq. 455), 49.
 Matthews v. Light (40 Me. 394), 452.
 Mattox v. United States (146 U. S. 140), 297.
 Maus v. Borne (123 Ind. 522), 340.
 May v. May (36 Ill. App. 77), 188.
 May v. State (90 Ga. 87), 503.
 Mayer v. Dean (115 N. Y. 556), 208.
 Mayfield v. Savannah, G. & N. A. R. Co. (87 Ga. 374), 383.
 Mayher v. People (10 Mich. 212), 450.
 Maynard v. Thompson (8 Wend. 393), 117.
 Maynerd v. Vinton (59 Mich. 139), 62.
 Mayor, etc. of New York v. Second Ave. R. Co. (102 N. Y. 572), 303.
 Maxwell v. Chapman (8 Barb. 579), 260.
 Maxwell v. Hill (89 Tenn. 584), 355.
 Meacham v. Pell (51 Barb. 65), 309.
 Mead v. Keeler (24 Barb. 20), 244.
 Mead v. Stratton (8 Hun, 148), 217.
 Meade v. McDonald (5 Binn. 195), 110.
 Meagley v. Hoyt (125 N. Y. 771), 212.
 Mealer v. State (Tex., 22 S. W. Rep. 142), 504.
 Mears v. Graham (8 Black. (Ind.) 144), 418.
 Mechanics' Bank v. Foster (29 How. Pr. 408), 30.
 Mechanics' Bank v. Gibson (7 Wend. 460), 95.
 Medlin v. Wilkins (1 Tex. Civ. App. 465), 496.
 Meech v. Smith (7 Wend. 315), 417.
 Megary v. Funtis (5 Sandf. 376), 236.
 Meier v. Kelly (20 Oreg. 86), 142.
 Meinst v. Snow (2 Mo. 851), 284.
 Melanefy v. Morrison (152 Mass. 473), 386.
 Meller v. Missouri P. R. Co. (105 Mo. 455), 57.
 Mendenhall v. Banks (16 Ind. 284), 22.
 Mendenhall v. Davis (72 Me. 150), 198.
 Mercantile Bank v. Taylor (1893, P. C. 317), 186.
 Merchants' Bank v. State Bank (10 Wall. 614), 240.
 Merchants' Estate (3 N. Y. Supp. 875), 38.
 Merchants' Nat. Bank of Whitehall v. Hall (83 N. Y. 341), 177.

The references are to pages.

- | | |
|---|--|
| Merchants' & F. Nat. Bank v. Mc-
Elvee (104 N. C. 315), 179. | Miller v. State (68 Miss. 221), 105. |
| Meriden Nat. Bank v. Gallandet (120
N. Y. 298), 271. | Miller v. Travers (8 Bing. 248), 160. |
| Merle v. Matthews (26 Cal. 455), 198. | Mills v. Allen (133 U. S. 423), 179. |
| Merrick v. Brainard (38 Barb. 574),
238. | Milwaukee, etc. R. Co. v. Kellogg (94
U. S. 469), 360. |
| Merrill v. Hole (Iowa, 52 N. W. Rep.
4), 15. | Miner v. Atherton (35 Pa. St. 528),
258. |
| Merritt v. Bartholick (36 N. Y. 44),
238. | Miner v. Boneham (15 Johns. 226),
287. |
| Merritt v. Briggs (57 N. Y. 651), 36. | Minneapolis Times Co. v. Nimicks (55
N. W. Rep. 546), 134. |
| Merritt v. Thompson (1 Hill (N. Y.),
550), 445. | Minor v. Baron (131 N. Y. 677), 287. |
| Mertz v. Brooklyn (128 N. Y. 617), 98. | Minor v. Tillotson (7 Pet. 99), 129. |
| Merwin v. Ward (15 Conn. 377), 134. | Mississippi County v. Vowels (101
Mo. 225), 340. |
| Messereaux v. Rogers (3 N. Y. 261),
250. | Missouri F. C. Works v. Ellison (30
Mo. App. 67), 476. |
| Messick v. Midland R. Co. (128 Ind.
81), 245. | Missouri, K. & T. R. Co. v. Graves
(Tex., 16 S. W. Rep. 102), 46. |
| Metler v. Miller (129 Ill. 636), 460. | Missouri P. R. Co. v. Baier (Neb., 55
N. W. Rep. 913), 326. |
| Metropolitan S. F. & Acc. Ass'n v.
Windover (137 Ill. 417), 230. | Missouri P. R. Co. v. Baxter (Kan., 22
Pac. Rep. 49), 427. |
| Meyer v. Lefton (2 Starkie, 274), 312. | Missouri P. R. Co. v. Breeding (Tex.,
16 S. W. Rep. 184), 426. |
| Meyer v. McCabe (73 Mo. 236), 455. | Missouri P. R. Co. v. China Mfg. Co.
(79 Tex. 26), 426. |
| Meyers v. Bealer (30 Neb. 280), 120. | Missouri P. R. Co. v. Heidenheimer
(82 Tex. 195), 356. |
| Meyers v. Boyd (44 Mo. App. 378),
270. | Mitchell v. Com. (Ky., 14 S. W. Rep.
489), 351. |
| Meyers v. Hunt (60 Hun, 579), 82. | Mitchell v. Mitchell (80 Tex. 101), 62. |
| Meyers v. Sefton (2 Stark. 276), 128. | Mitchell v. State (94 Ala. 68), 191. |
| Michum v. State (11 Ga. 15), 21. | Mitchell v. United States (21 Wall.
350), 259. |
| Miles v. Loomis (75 N. Y. 288), 404. | Mobile & B. R. Co. v. Ladd (92 Ala.
287), 315. |
| Miles v. Oddy (6 C. & P. 732), 128. | Mobile & O. R. Co. v. George (94 Ala.
199), 276. |
| Miliken v. Martin (66 Ill. 13), 457. | Mobile Sav. Bank v. McDonnell (89
Ala. 434), 353. |
| Miller v. Adkins (9 Hun, 9), 249. | Moffatt v. Sackett (18 N. Y. 522), 36. |
| Miller v. Bingham (29 Vt. 82), 111. | Moffett v. Hill (131 Ill. 239), 259. |
| Miller v. Clark (40 Fed. Rep. 15), 354. | Moffit v. Wetherspoon (10 Ired. (N. C.)
185), 286. |
| Miller v. Highland Ditch Co. (87 Cal.
430), 269. | Mohr v. Missen (47 Minn. 228), 15. |
| Miller v. Indianapolis (123 Ind. 196),
92. | Monkton v. Attorney-General (2 Russ.
& M. 156), 285. |
| Miller v. Long (99 Mass. 13), 509. | |
| Miller v. Louisville, N. & C. R. Co.
(128 Ind. 97), 405. | |
| Miller v. Ocean Steamship Co. (118
N. Y. 199), 425. | |
| Miller v. State (Tex., 21 S. W. Rep.
925), 326. | |

The references are to pages.

- Monroe v. Perkins (9 Pick. 298), 394.
 Monroe v. Snow (131 Ill. 126), 97.
 Montana R. Co. v. Warren (137 U. S. 348), 477.
 Montgomery v. Allen (84 Mich. 656), 64.
 Montgomery v. Craig (128 Ind. 48), 203.
 Montgomery v. Crosthwait (90 Ala. 533), 383.
 Montgomery v. Long Island R. Co. (55 Hun, 43), 363.
 Montgomery v. Montgomery (3 Barb. Ch. 132), 436.
 Montgomery v. State (11 Ohio St. 424), 299.
 Mooers v. Blanker (29 Vt. 431), 448.
 Moore v. Carter (146 Pa. St. 492), 12.
 Moore v. Chicago & St. P. R. Co. (78 Ill. 120), 376, 459.
 Moore v. Davis (57 Mich. 251), 238, 638.
 Moore v. Flynn (135 Ill. 74), 459.
 Moore v. Shields (121 Ind. 267), 348.
 Moore v. New York El. R. Co. (130 N. Y. 523), 226.
 Moore v. United States (91 U. S. 270), 399.
 Moors v. Glover (37 N. Y. State Rep. 397), 187.
 Moran v. Pelefant (28 Ill. App. 278), 441.
 Moran v. Prathers (23 Wall. 492), 144.
 Morassi v. Broehn (25 N. E. Rep. 74), 12.
 More v. Hill (Vt., 19 Atl. Rep. 99), 108.
 Morewood v. Wood (14 East, 329), 277.
 Morey v. Henry (86 Cal. 471), 203.
 Morey v. Hoyt (62 Conn. 542), 123.
 Morgan v. Farrell (58 Conn. 413), 94.
 Morgan v. Freese (15 Barb. 372), 21.
 Morgan v. Griffith (L. R. 6 Ex. 70), 197.
 Morowske v. Rohrig (53 N. Y. State Rep. 220), 25, 150.
 Morrill v. Whitehead (4 E. D. Smith, 239), 306.
 Morris v. McClery (Minn., 46 N. W. Rep. 238), 447.
 Morris v. Morton (14 Ky. L. Rep. 360), 318.
 Morris v. Sickley (135 N. Y. 456), 252.
 Morris v. State (30 Tex. App. 95), 405.
 Morris v. Talcott (96 N. Y. 107), 225.
 Morrison v. Morrison (140 Ill. 560), 249.
 Morrison v. Myers (11 Iowa, 538), 22.
 Morrison v. Press Pub. Co. (133 N. Y. 538), 23.
 Morse v. Rice (36 Neb. 122), 181.
 Morseley v. Davis (11 Price, 162), 279.
 Morseley v. Vermont Mut. Ins. Co. (55 Vt. 142), 95.
 Morsemaur v. Manhattan R. Co. (32 N. Y. State Rep. 61), 428.
 Mortimer v. Callan (6 M. & W. 67), 129.
 Mortimer v. Chambers (63 Hun, 335), 82.
 Mortimer v. Marder (93 Cal. 172), 455.
 Moss v. Green (41 Mo. 387), 49.
 Most v. Pierce (58 Iowa, 579), 206.
 Moundsville v. Velton (35 W. Va. 217), 91.
 Mowry v. Latham (17 R. I. 480), 417.
 Mowry v. Raabe (89 Cal. 606), 391.
 Moyer v. N. Y. C. & H. R. R. Co. (98 N. Y. 645), 365.
 Muckle v. Rennie (41 N. Y. State Rep. 97), 305.
 Mugge v. Adams (76 Tex. 448), 131.
 Mullen v. Prior (12 Mo. 307), 440.
 Mullen v. St. John (57 N. Y. 567), 219.
 Muller v. Southern P. R. Co. (83 Cal. 240), 295.
 Mullighan v. N. Y. C. & H. R. R. Co. (58 Hun, 602), 425.
 Munn v. Godbolt (3 Bing. 297), 129.
 Munroe v. Gates (48 Me. 461), 434.
 Munroe v. Williams (35 S. C. 572), 194.
 Munson v. Wickwire (21 Conn. 513), 112.
 Murphy v. Joek (58 N. Y. State Rep. 458), 356.
 Murphy v. Nathans (46 Pa. St. 508), 251.

The references are to pages.

- Murphy v. N. Y., L. E. & W. R. Co.** (98 N. Y. 635), 365.
- Murray v. State** (57 Ala. 142), 448.
- Murphy v. St. Louis, L. M. & S. R. Co.** (43 Mo. App. 540), 273.
- Murphy's Case** (H. C. & P. 297), 493.
- Murray v. Bennington** (3 Abb. Ct. App. Dec. 336), 273.
- Murray v. Coster** (4 Cow. 618), 64.
- Murray v. Lardner** (2 Wall. 110), 511.
- Murray v. Smith** (1 Duer, 412), 41.
- Murray v. State** (25 Fla. 528), 116.
- Murray v. Titcomb** (19 Ind. 135), 95.
- Murrell v. Whitney** (32 Ala. 54), 213.
- Murtaugh v. N. Y. C. & H. R. R. Co.** (49 Hun, 456), 381.
- Mutcher v. Peirce** (44 Wis. 231), 347.
- Mutual Life Ins. Co. v. Corey** (54 Hun, 493), 53.
- Mutual Life Ins. Co. v. Nat. Bank & L. Co.** (50 Hun, 101), 313.
- Mutual Life Ins. Co. v. Snider** (134 N. Y. 557), 400.
- Mutual Life Ins. Co. v. Tillman** (84 Tex. 31), 397.
- Myers v. Cohen** (53 N. Y. State Rep. 223), 326.
- Myers v. Davis** (22 N. Y. 489), 240.
- N.**
- Nadan v. White River L. Co.** (76 Wis. 120), 315.
- Namberg v. Young** (35 N. J. L. 330), 206.
- Narragansett Bank v. Atlantic Silk Co.** (3 Metc. 282), 243.
- Nary v. Randolph** (125 N. Y. 759), 312.
- National Car & L. Bldg. v. Cyclone S. S. P. Co.** (49 Minn. 125), 209.
- National German Bank v. Long** (2 N. D. 66), 100, 455.
- National Ulster County Bank v. Mad-den** (114 N. Y. 280), 312.
- Naylor v. McSwegan** (50 N. Y. State Rep. 339), 186.
- Neiswanger v. McClellen** (45 Kan. 599), 192.
- Nelson v. Becker** (32 Neb. 99), 49.
- Nelson v. Bolan** (37 Mo. 432), 236.
- Nelson v. Cook** (19 Ill. 440), 107.
- Nelson v. Eaton** (26 Barb. 410), 244.
- Nelson v. Masterson** (2 Ind. App. 524), 249.
- Nelson v. People** (23 N. Y. 393), 428.
- Nelson v. Smith** (36 N. J. L. 148), 172.
- Nelson v. Sun Mut. Ins. Co.** (71 N. Y. 453), 150.
- Newark v. Stout** (52 N. J. L. 35), 88.
- Newcomb v. State** (37 Miss. 383), 21, 44.
- Newell v. Nichols** (12 Hun, 604), 382.
- Newell v. Nichols** (75 N. Y. 78), 397.
- Newhall v. Appleton** (114 N. Y. 140), 161.
- New Hampshire Cattle Co. v. Bilby** (37 Mo. App. 43), 152.
- Newly v. Myers** (44 Kan. 477), 307.
- Newman v. Irwin** (43 La. Ann. 1114), 422.
- Newman v. Stuckey** (57 Hun, 589), 269.
- New Mexico R. Co. v. Hendricks** (N. M., 30 Pac. Rep. 901), 408.
- New York D. D. Co. v. Treadwell** (19 Wend. 525), 37.
- New York, L. E. & W. R. Co. v. Es-till** (147 U. S. 591), 381.
- New York, L. E. & W. R. Co. v. Win-ter** (143 U. S. 60), 327.
- New York & N. H. R. Co. v. Schuy-ler** (34 N. Y. 30), 245.
- Nicholl v. Douding** (1 Stark. 81), 493.
- Nichols v. Jones** (32 Mo. App. 657), 39.
- Nichols v. Nichols** (133 Pa. St. 438), 179.
- Nichols v. Parker** (14 East, 331), 279.
- Nichols v. Scranton Steel Co.** (64 Hun, 632), 207.
- Nickerson v. Gould** (82 Me. 512), 8.
- Nightingale v. Chaffee** (11 R. I. 609), 236.
- Nix v. Hedden** (149 U. S. 304), 96.

The references are to pages.

Nixon v. McKinney (105 N. C. 23),
390.

Nobles v. Hogg (36 S. C. 322), 451.

Noden v. Murrey (3 Camp. 224), 121.

Noonan v. Bradley (9 Wall. 394), 247.

Noonan v. N. Y. C. & H. R. R. Co.
(131 N. Y. 594), 319.

Norman v. Kentucky Board of Man.
of W. F. C. Ex. (47 Alb. L. J.
190), 89.

Norris v. Tiffany (56 N. Y. State Rep.
406), 201.

Norristown Title & S. D. Co. v. John
Hancock Mut. Life Ins. Co. (132
Pa. St. 385), 194.

North v. Bloss (30 N. Y. 380), 37.

North v. Metz (57 Mich. 612), 328.

North v. People (139 Ill. 81), 247, 267.

North Brookfield v. Warren (16 Gray,
171, 174), 129.

North Chicago St. R. Co. v. Cook (145
Ill. 551), 399.

North Chicago St. R. Co. v. Louis (148
Ill. 9), 425.

North River Bank v. Aymar (3 Hill,
262), 246.

North Star Boot & S. Co. v. Stebbins
(48 N. W. Rep. 833), 272.

Northeastern R. Co. v. Chandler (Ga.,
10 S. E. Rep. 586), 137, 315.

Northern Nat. Bank v. Lewis (78
Wis. 475), 151, 194.

Northern P. R. Co. v. Sullivan (53
Fed. Rep. 219), 102.

Northrup v. Mississippi Valley Ins.
Co. (47 Mo. 435), 32.

Northwestern Fuel Co. v. Brun (N.
D., 45 N. W. Rep. 669), 187.

Norton v. Bohart (105 Mo. 615), 187.

Norton v. Livingston (64 Vt. 473), 14.

Norton v. St. Louis & H. R. Co. (40
Mo. App. 642), 424.

Nott v. Thomson (35 S. C. 461), 432.

Noxon v. De Wolfe (10 Gray, 343), 432.

Noyes v. Morris (56 Hun, 501), 335.

Noyes v. White (19 Conn. 250), 282.

Nute v. Nute (41 N. H. 60), 22.

Nutting v. Paige (4 Gray, 584), 323.

O.

Oakley v. Morton (11 N. Y. 25), 30.

Oatmaker v. Buckley (16 Serg. &
Rawle, 77), 200.

Oberlander v. Spiess (45 N. Y. 175),
31.

O'Brien v. Gilchrist (34 Me. 554), 191.

O'Brien v. Home Benefit Soc. (117
N. Y. 310), 213.

O'Brien v. People (36 N. Y. 282), 373.

O'Brien v. Prescott Ins. Co. (134 N.
Y. 28), 192.

O'Brien v. Weiler (68 Hun, 64), 326.

O'Calaghan v. Barrett (66 Hun, 633),
327.

O'Day v. Chaffee (64 Hun, 637), 14.

O'Dell v. Metropolitan El. R. Co. (52
N. Y. State Rep. 7), 488.

O'Donnell v. Hall (15 Mass. 463), 226.

O'Donnell v. Johns (76 Tex. 362), 135.

O'Donohue v. Leggitt (134 N. Y. 40),
158.

O'Gara v. Eisenlohr (38 N. Y. 296),
259.

Ogden v. People (134 Ill. 599), 363.

Ogden v. Pope (44 N. Y. State Rep.
646), 432.

Ogden v. Prentice (33 Barb. 160), 265.

Ohio & M. R. Co. v. Nuetzel (143 Ill.
46), 362.

Ohio & M. R. Co. v. Voight (122 Ind.
288), 424.

Ohio S. R. Co. v. Morey (47 Ohio St.
23), 135.

O'Keefe v. St. Francis Church (59
Conn. 551), 192.

Olcutt v. Tioga R. Co. (27 N. Y. 546),
246.

Oldfield v. N. Y. & H. R. R. Co. (14
N. Y. 310), 29.

O'Leary v. McDonough (52 N. Y.
State Rep. 270), 152.

Olf v. Gardner (48 Hun, 169), 412.

Oliphant v. Leversidge (Ill., 27 N. E.
Rep. 921), 435.

Oliver v. Hunting (L. R. 44 Ch. D.
205), 179.

The references are to pages.

Oliver v. Louisville & N. R. Co. (43 La. Ann. 804), 105.	Page v. Parker (40 N. H. 47), 360.
Oliver v. Pate (41 Ind. 132), 60.	Paige v. Hazzard (5 Hill, 603), 378.
Olsen v. Peterson (33 Neb. 358), 65.	Paige v. New York (58 Hun, 603), 119.
Omaha S. R. Co. v. Beeson (36 Neb. 7), 141.	Paige v. Willet (38 N. Y. 28), 26. 41.
O'Michund v. Barker (1 Smith's Lead. Cas. 536-545), 66.	Paillon v. Secor (61 N. Y. 456), 271.
O'Neil v. Dry-dock, E. B. & B. R. Co. (129 N. Y. 125), 380.	Paine v. Aldrich (133 N. Y. 544), 375.
O'Neil v. Lyman & B. R. Co. (155 Mass. 371), 319.	Paine v. Farr (118 Mass. 74), 5.
Oppenheim v. Wolf (3 Sandf. Ch. 571), 95.	Paine v. Parsons (14 Pick. 320), 257.
Ordway v. Dow (55 N. H. 11), 256.	Paine v. Schenectady Ins. Co. (11 R. I. 411), 99.
Orrick v. Stewart (Miss., 12 S. Rep. 824), 232.	Paland v. Chicago, St. L. & N. C. R. Co. (42 La. Ann. 290), 97.
Ortiz v. State (30 Fla. 256), 141.	Pallen v. Monk (82 Me. 412), 259.
Orton v. Jewett (23 Ala. 19), 26.	Pallman v. Smith (135 Pa. St. 188), 305.
Osborn v. Blackburn (78 Wis. 200), 455.	Palmer v. Farrell (129 Pa. St. 162), 179.
Osborn v. Wilkes (108 N. C. 651), 419.	Palmer v. Gilmore (148 Pa. St. 48), 353.
Osgood v. Bander (82 Iowa, 171), 161.	Palmer v. Lawrence (3 Sandf. Ch. 161), 44.
Ostrander v. Snyder (57 N. Y. State Rep. 287), 6.	Palmer v. Michigan C. R. Co. (93 Mich. 363), 99, 113.
Ottinger v. N. Y. El. R. Co. (63 Hun, 631), 479.	Palmer v. Mt. Sterling Nat. Bank (13 Ky. L. Rep. 790), 431.
Ouderkirk v. Central Nat. Bank (119 N. Y. 263), 427.	Palmer v. Transportation Co. (57 N. Y. State Rep. 307), 500.
Overby v. Chesapeake & O. R. Co. (37 W. Va. 524), 357.	Panama R. Co. v. Johnson (58 Hun, 557), 435.
Owen v. State (89 Tenn. 698), 73.	Pareira v. Smith (52 N. Y. State Rep. 124), 139.
Owens v. State (94 Ala. 97), 11.	Parish v. Wheeler (22 N. Y. 494), 243.
Owings v. Speed (5 Wheat. 420), 316.	Parker v. Georgia P. R. Co. (83 Ga. 539), 316.
	Parker v. Lake Shore & M. S. R. Co. (93 Mich. 607), 474.
	Parker v. McCluer (3 Abb. Ct. App. Dec. 454), 251.
	Parker v. State (4 Ohio St. 563), 216.
	Parker v. State, Powell (Ind., 32 N. E. Rep. 836), 96.
	Parker v. Thompson (3 Pick. 429), 207.
	Parkhurst v. Berdell (110 N. Y. 386), 63.
	Parkhurst v. Lawton (2 Swans. 216), 46.
	Parks v. Parks (19 Md. 323), 250.

P.

Pace v. State (Tex., 20 S. W. Rep. 762), 505.	
Pacific Express Co. v. Detroit (44 Fed. Rep. 310), 89.	
Packard v. Hill (7 Cow. 434), 127.	
Packett v. Sickles (5 Wall. 593), 507.	
Paddock v. Balgord (S. D., 48 N. W. Rep. 840), 214.	
Paddock v. Forrester (5 M. & G. 918), 64.	
Page v. Page (16 Pick. 368), 129.	

The references are to pages.

- Parks v. Ross (11 How. (U. S.) 362), 267.
- Parks v. Smith (155 Mass. 26), 453.
- Parmenter v. Fitzpatrick (135 N. Y. 190), 482.
- Parrott v. Swain (29 Ill. App. 266), 364.
- Partridge v. Badger (25 Barb. 173), 246.
- Passaic County Freeholders v. Downie (54 N. J. L. 223), 327.
- Passey v. New Jersey R. Co. (14 Abb. Pr. (N. S.) 441), 508.
- Passmore v. Passmore (60 Mich. 463), 10, 137.
- Paton v. Ormerod (1892, P. 247), 252.
- Patrick v. Crows (15 Colo. 543), 64.
- Patten v. United Life & Acc. Ass'n (133 N. Y. 450), 56.
- Patterson v. Ramspeck (81 Ga. 808), 147.
- Patterson v. Schenck (3 Green, 434), 194.
- Patterson v. South & N. A. R. Co. (Ala., 7 S. Rep. 437), 164.
- Patterson v. Stettauer (40 N. Y. Super. Ct. 54), 33.
- Patterson v. Winn (5 Pet. 233), 128.
- Pattison v. Hull (9 Cow. 747), 238.
- Paul v. Malons (87 Ala. 544), 429.
- Pawling v. Haskins (132 Pa. St. 617), 426.
- Payne v. Halstead (44 Ill. App. 95), 221.
- Payne v. Hodge (7 Hun, 612), 312.
- Payne v. Hodge (71 N. Y. 598), 303.
- Peabody v. Bement (Mich., 44 N. W. Rep. 416), 179.
- Peabody v. Hewitt (52 Me. 33), 297.
- Peagler v. Stabler (91 Ala. 308), 203.
- Pearce v. Hooper (3 Taunt. 60), 121.
- Pearce v. Jackson (10 Ired. (N. C.) 355), 300.
- Pearce v. Laughfit (101 Pa. St. 507), 95.
- Pearsall v. W. U. Tel. Co. (124 N. Y. 256), 224.
- Pease v. Batten (56 Hun, 643), 352.
- Peck v. Callaghan (95 N. Y. 75), 400.
- Peck v. Peck (27 L. T. (N. S.) 670), 251.
- Peck v. Sims (120 Ind. 345), 98.
- Peck v. Valentine (94 N. Y. 569), 303.
- Peisch v. Dickson (1 Mason, 9), 148.
- Pelamourges v. Clark (9 Iowa, 1, 12), 360.
- Pelican Fire Ins. Co. v. Troy Co-operative Ass'n (77 Tex. 225), 214.
- Pelly v. Onderdonk (61 Hun, 314), 513.
- Pelzer Mfg. Co. v. Sun Fire Office (36 S. C. 213), 198.
- Penaker & C. Cor. v. Lamson (4 Shepley, 224), 184.
- Pence v. Chicago, R. I. & P. R. Co. (79 Iowa, 375), 380.
- Pence v. Croan (51 Ind. 338), 228.
- Pending v. Crescent Life Ins. Co. (21 La. Ann. 410), 39.
- Pendleton v. Cline (85 Cal. 142), 213.
- Pendleton v. Saunders (Oreg., 24 Pac. Rep. 506), 378.
- Pendleton v. Weed (17 N. Y. 72), 306.
- Pendley v. Eaton (130 Ill. 69), 441.
- Penfield v. Chesapeake, O. & S. W. R. Co. (134 U. S. 351), 259.
- Penn v. Kearney (31 La. Ann. 21), 108, 270.
- Pennsylvania Co. v. Marion (123 Ind. 415), 57.
- Pennsylvania Co. v. Roy (102 U. S. 451), 500.
- Pennsylvania Mut. Life Ins. Co. v. Kesch (134 Ill. 583), 329.
- Pennsylvania R. Co. v. Bonnell (81 Pa. St. 414), 484.
- Pennsylvania R. Co. v. Frund (4 Ind. App. 469), 396.
- Pennsylvania R. Co. v. Lyons (129 Pa. St. 113), 342.
- Pennsylvania R. Co. v. Mitchell (124 Ind. 473), 332.
- Pennsylvania S. V. R. Co. v. Zeiner (124 Pa. St. 560), 484.

The references are to pages.

- Penny v. Croul (Mich., 44 Alb. L. J. 225), 79.
- People v. Ackerman (80 Mich. 588), 92.
- People v. Augsburg (97 N. Y. 501), 372.
- People v. Austin (1 Park. Cr. Cas. 154), 21.
- People v. Barber (115 N. Y. 475), 364.
- People v. Barker (60 Mich. 277), 116.
- People v. Beach (93 Mich. 25), 406.
- People v. Bemmerly (87 Cal. 117), 232.
- People v. Black (73 N. Y. 586), 379.
- People v. Bodine (1 Dana, 282), 16.
- People v. Brandon (42 N. Y. 265), 45.
- People v. Brown (72 N. Y. 571), 46.
- People v. Calder (30 Mich. 87), 360.
- People v. Carrall (3 Park. Cr. Rep. 73), 45.
- People v. Casey (72 N. Y. 393), 48.
- People v. Cassidy (133 N. Y. 612), 116, 139.
- People v. Chacon (3 N. Y. Cr. Rep. 418), 373.
- People v. Chapleau (121 N. Y. 266), 116.
- People v. Chegaray (18 Wend. 642), 76.
- People v. Chukee (61 Cal. 404), 92.
- People v. Connors (50 N. Y. 240), 45.
- People v. Conroy (97 N. Y. 62), 373.
- People v. Crapo (76 N. Y. 288), 48.
- People v. Dailey (73 Hun, 16), 502.
- People v. Davis (21 Wend. 309), 18.
- People v. Davis (56 N. Y. 95), 349.
- People v. Deacon (109 N. Y. 374), 363.
- People v. De Kroft (49 Hun, 71), 402.
- People v. Doyle (58 Hun, 535), 354.
- People v. Driscoll (107 N. Y. 414), 374.
- People v. Eastwood (14 N. Y. 562), 215, 359.
- People v. Elyea (14 Cal. 144), 308.
- People v. Fanning (131 N. Y. 659), 116.
- People v. Fanshaw (65 Hun, 77), 377.
- People v. Farrell (30 Cal. 316), 505.
- People v. Fick (89 Cal. 144), 22.
- People v. Fish (125 N. Y. 136), 339.
- People v. Fox (121 N. Y. 449), 116.
- People v. Fulda (52 Hun, 65), 231.
- People v. Fulton Fire Ins. Co. (25 Wend. 208), 284.
- People v. Gardinier (57 N. Y. State Rep. 18), 502.
- People v. Gardner (73 Hun, 66), 227.
- People v. Gates (13 Wend. 311), 59.
- People v. Gaulette (Mich., 45 N. W. Rep. 1124), 343.
- People v. Gay (7 N. Y. 378), 47.
- People v. Genung (11 Wend. 19), 47.
- People v. Gonzales (35 N. Y. 61), 368.
- People v. Green (1 Park. Cr. Rep. 11), 297.
- People v. Green (1 Denio, 614), 76.
- People v. Greenfield (85 N. Y. 75), 345.
- People v. Haas (79 Mich. 449), 206.
- People v. Hare (57 Mich. 505), 10, 363.
- People v. Harris (136 N. Y. 423), 56, 371.
- People v. Hayes (140 N. Y. 484), 63.
- People v. Hennesey (15 Wend. 147), 114.
- People v. Herrick (13 Johns. 82), 44.
- People v. Hillhouse (80 Mich. 580), 51.
- People v. Hinchman (75 Mich. 587), 138.
- People v. Hulett (61 Hun, 620), 23.
- People v. Johr (22 Mich. 461), 92.
- People v. Josephs (7 Cal. 129), 16.
- People v. Kelly (10 Smith, 74), 44.
- People v. Kemmler (119 N. Y. 580), 389.
- People v. Kief (126 N. Y. 661), 348.
- People v. Lanogan (81 Cal. 142), 297.
- People v. Lewis (62 Hun, 622), 61.
- People v. Loui Tung (90 Cal. 377), 404.
- People v. McCann (16 N. Y. 61), 88.
- People v. McElwaine (121 N. Y. 250), 389.
- People v. McGinnis (1 Park. Cr. Rep. 387), 20.
- People v. Manhattan Co. (9 Wend. 351), 441.
- People v. Miller (2 Park. Cr. Rep. 197), 49.

The references are to pages.

- People v. Miller (91 Mich. 639), 467.
 People v. Mitchell (94 Cal. 550), 406.
 People v. Moore (50 Hun, 356), 392.
 People v. Mullings (83 Cal. 138), 62.
 People v. Murphy (135 N. Y. 450), 400.
 People v. Nevins (1 Hill, 154), 97.
 People v. Noelke (29 Hun, 461), 506.
 People v. Noelke (94 N. Y. 137), 48.
 People v. O'Neil (112 N. Y. 355), 323.
 People v. Osmond (138 N. Y. 80), 388.
 People v. Pallister (138 N. Y. 601), 326.
 People v. Parr (42 Hun, 313), 357.
 People v. Platt (117 N. Y. 159), 259.
 People v. Ribalsi (Cal., 26 Pac. Rep. 1082), 231.
 People v. Rice (135 N. Y. 473), 96.
 People v. Rohrs (49 Hun, 150), 509.
 People v. Samonset (Cal., 32 Pac. Rep. 520), 32.
 People v. Schuyler (106 N. Y. 298), 59.
 People v. Sharpe (14 N. E. Rep. 310), 370.
 People v. Sherman (133 N. Y. 349), 327.
 People v. Sliney (137 N. Y. 570), 56.
 People v. Smiler (125 N. Y. 717), 376.
 People v. Smith (59 Cal. 365), 417.
 People v. Snyder (41 N. Y. 397), 95, 417.
 People v. Stewart (Cal., 32 Pac. Rep. 8), 331.
 People v. Stott (5 N. Y. Cr. Rep. 61), 365.
 People v. Stout (4 Park. Cr. Rep. 71), 502.
 People v. Taylor (138 N. Y. 398), 387.
 People v. Travers (88 Cal. 233), 231.
 People v. Van Alstine (57 Mich. 62), 53.
 People v. Vanderhoof (71 Mich. 158), 376.
 People v. Ward (15 Wend. 231), 114.
 People v. Webster (68 Hun, 11), 141.
 People v. White (14 Wend. 111), 16.
 People v. Wilson (109 N. Y. 345), 375.
 People v. Wolf (95 Mich. 625), 505.
 People v. Wong Wang (92 Cal. 277), 89.
 People v. Wood (126 N. Y. 249), 63, 503.
 People v. Wood (131 N. Y. 617), 99.
 People v. Wright (89 Mich. 70), 138.
 People v. Wright (93 Cal. 564), 390.
 People v. Zeyst (22 N. Y. 140), 321.
 People ex rel. Babcock v. Murray (5 Hun, 42), 266.
 People ex rel. Greenwood v. Board of Sup'rs (125 Ill. 334), 127.
 People ex rel. Henry v. Nostrand (46 N. Y. 376), 266.
 People ex rel. Kelly v. McLean (59 N. Y. 626), 57.
 People ex rel. Kemmler v. Durstan (119 N. Y. 569), 389.
 People ex rel. Mayor, etc. v. McCarthy (102 N. Y. 630), 483.
 People ex rel. Phelps v. Oyer & Term., etc. (83 N. Y. 460), 48.
 People ex rel. Soer v. Crane (125 N. Y. 535), 417.
 People's Bank v. Bogart (81 N. Y. 101), 225.
 Pependick v. Bridgwater (5 Ellis & B. 166), 301.
 Pepper v. Caines (133 Pa. St. 114), 328.
 Perine v. Grand Lodge A. O. U. W. (48 Minn. 82), 68, 232.
 Perkins v. Concord (44 N. H. 223), 342.
 Perkins v. Hasbrouck (155 Pa. St. 494), 302.
 Perkins v. Peterson (2 Colo. App. 242), 38.
 Perot v. Cooper (17 Colo. 80), 432.
 Perrins v. Cooley (39 N. J. L. 449), 206.
 Perry v. Jensen (142 Pa. St. 125), 383.
 Perry v. State (87 Ala. 30), 399.
 Perry v. State (94 Ala. 25), 923.
 Persons v. Parker (3 Barb. 249), 39.
 Petch v. Billings (2 Bing. 269), 99.
 Peters v. Fowler (41 Barb. 467), 262.
 Peterson v. Chemical Bank (32 N. Y. 21), 239.

The references are to pages.

- Peterson v. Chicago, R. I. & P. R. Co. (45 N. W. Rep. 573), 187.
- Peterson v. Knoble (35 Wis. 80), 215.
- Petrie v. Phoenix Ins. Co. (132 N. Y. 137), 158, 252.
- Peyser v. Myers (45 N. Y. State Rep. 413), 273.
- Phibbin v. Patricks (3 Abb. Ct. App. Dec. 605), 312.
- Philadelphia, etc. R. Co. v. Hickman (28 Pa. St. 318), 317.
- Philadelphia & T. R. Co. v. Stimpson (14 Pet. 448), 494.
- Phillip v. Evans (64 N. M. 17), 447.
- Phillips v. Bartlett (9 Bosw. 678), 36.
- Phillips v. Herndon (78 U. S. 378), 328.
- Phillips v. Insurance Co. (56 Hun, 640), 510.
- Phillips v. Kingsfield (19 Me. 375), 17.
- Phillips v. McCombs (53 N. Y. 494), 257.
- Phillips v. McNab (30 N. Y. State Rep. 853), 481.
- Phillips v. Milwaukee & N. R. Co. (77 Wis. 349), 425.
- Phillips v. Nash (47 Ga. 218), 273.
- Phoenix Clay Pot. Wks. v. Pittsburgh & L. E. R. Co. (139 Pa. St. 284), 426.
- Phoenix Ins. Co. v. Pickle (3 Ind. App. 332), 458.
- Pickard v. Sears (6 A. & E. 469), 509.
- Pickett v. Green (120 Ind. 584), 180.
- Picton's Case (20 S. T. 510), 360.
- Piedmont Land Co. v. Piedmont F. & N. Co. (Ala., 11 S. Rep. 332), 179.
- Pier v. Heinrichoffen (52 Mo. 333), 33.
- Pierce v. Indseth (106 U. S. 546), 92.
- Pierce v. Sutesville (25 Mo. App. 317), 479.
- Pierce v. Wallace (34 Ill. 175), 131.
- Pierce v. Wilson (34 Ala. 596), 195.
- Pierson v. Atlantic Bank (77 N. Y. 304), 122.
- Pierson v. Hoag (47 Barb. 243), 347.
- Pierson v. People (79 N. Y. 524), 502.
- Pike v. Fay (101 Mass. 134), 143.
- Pike v. Hayes (14 N. H. 19), 300.
- Pike v. Wiggins (8 N. H. 356), 104.
- Pindar v. Resolute F. Ins. Co. (47 N. Y. 115), 148.
- Pingery v. Cherokee & D. R. Co. (78 Iowa, 438), 481.
- Pingry v. Watkins (17 Vt. 379), 148.
- Pinkham v. Benton (67 N. H. 687), 137.
- Pinkham v. Cockell (77 Mich. 265), 428.
- Pirsson v. Arkenbury (126 N. Y. 668), 142.
- Pitcher v. Gagen (Ky., 15 S. W. Rep. 513), 207.
- Pitten v. Walker (1 Str. 162), 287.
- Pittman v. State (25 Fla. 648), 398.
- Pittman v. State (Ga., 17 S. E. Rep. 856), 504.
- Pitts v. Lewis (81 Iowa, 57), 93.
- Pitts v. Wilder (1 N. Y. 525), 334.
- Place v. Minister (65 N. Y. 89), 269.
- Platner v. Platner (78 N. Y. 90), 495.
- Pleasant v. State (15 Ark. 624), 44.
- Plumer v. Brisco (11 Q. B. 46), 122.
- Pocock v. Billings (2 Bing. 269), 111.
- Poe v. Darrah (20 Ala. 288), 131.
- Poignard v. Smith (8 Pick. 272), 131.
- Pokriefka v. Muckarat (91 Mich. 399), 11.
- Polhans v. Atchison, T. & S. F. R. Co. (45 Mo. App. 153), 428.
- Pollok v. Davidson (87 Ala. 551), 437.
- Pomfrey v. Saratoga (104 N. Y. 469), 8, 14.
- Pontius v. People (82 N. Y. 339), 502.
- Pool v. Dean (152 Mass. 589), 389.
- Pool v. Myers (21 Miss. 466), 122.
- Pope v. Dodson (58 Ill. 360), 453.
- Pope v. Kansas City Cable Co. (99 Mo. 400), 439.
- Pope v. Terre Haute Car & Mfg. Co. (107 N. Y. 61), 150.
- Poppinlarger v. Smith (27 Neb. 788), 395.
- Porachane Water Co. v. Standart (Cal., 32 Pac. Rep. 532), 381.

The references are to pages.

- Porter v. Dunn (131 N. Y. 314), 78, 264.
 Porter v. First Nat. Bank of Williams
 (4 Ind. App. 501), 305.
 Porter v. Gardner (39 N. Y. State Rep.
 671), 354.
 Porter v. Gardner (60 Hun, 571), 239.
 Porter v. Wilson (13 Pa. St. 541), 131.
 Portier v. Barclay (15 Ala. 439), 128.
 Post v. Post (70 Ill. 484), 435.
 Post Express Print. Co. v. Coursey
 (57 Hun, 385), 328.
 Potter v. Deyo (19 Wend. 361), 27.
 Potter v. Hopkins (25 Wend. 417),
 196.
 Potter v. Kennedy (81 Iowa, 96), 457.
 Potter v. Ogden (136 N. Y. 384), 232.
 Powell v. Martin (10 Iowa, 568), 21.
 Powell v. Olds (9 Ala. 861), 251.
 Power v. Kent (1 Cow. 211), 50.
 Powers v. Bowdle (N. D., 54 N. W.
 Rep. 404), 96.
 Powers v. Savin (46 N. Y. State Rep.
 709), 304.
 Powers v. West Troy (25 Hun, 561),
 347.
 Prairie School Tp. v. Haselen (55 N.
 W. Rep. 938), 181.
 Pratt v. Castle (91 Mich. 484), 181.
 Pratt v. N. Y. C. & H. R. R. Co. (59
 N. Y. State Rep. 38), 479.
 Pray v. Rhodes (42 Minn. 93), 179.
 Prentice v. Bates (93 Mich. 234), 388.
 Prentice v. Dike (6 Duer, 220), 37.
 Preston v. Leighton (6 Md. 58), 438.
 Price v. Brown (112 N. Y. 677), 85.
 Price v. Connecticut Mut. Ins. Co. (48
 Mo. App. 281), 474.
 Price v. Hartshorn (44 N. Y. 94), 358.
 Price v. Page (4 Ves. 680), 160, 255.
 Price v. Reed (38 Mo. App. 489), 179.
 Price v. Richmond & D. R. Co. (38 S.
 C. 117), 221.
 Price v. State (18 Ohio St. 418), 115.
 Price v. Tallman (1 N. J. L. 447), 438.
 Prichard v. James (Ky., 20 S. W. Rep.
 216), 152.
 Prideaux v. Mineral Point (43 Wis.
 513), 347.
 Pridham v. Weddington (74 Tex. 354),
 390.
 Priest v. Glenn (51 Fed. Rep. 400),
 496.
 Prince v. Dunn (2 E. D. Smith, 525),
 34.
 Prince v. Gundaway (157 Mass.
 417), 9.
 Prince v. Samo (7 Ad. & Ell. 627),
 495.
 Pringle v. Pringle (59 Pa. St. 289),
 335.
 Proctor v. Old Colony R. Co. (154
 Mass. 251), 114.
 Prosius v. McIntyre (5 Barb. 424), 251.
 Prudential Ins. Co. v. Fredericks (41
 Ill. App. 419), 113.
 Pullen v. Hutchinson (25 Me. 249),
 434.
 Pulliam v. State (87 Ala. 121), 297.
 Pulliam v. State (88 Ala. 1), 297.
 Pullman's Palace Car Co. v. Harkins
 (55 Fed. Rep. 932), 384.
 Pullman's Palace Car Co. v. Smith
 (79 Tex. 468), 398.
 Putman v. Fisher (53 Vt. 191), 296.
 Putman v. Sullivan (4 Mass. 45), 509.
- Q.**
- Queen's Case (2 B. & B. 292; 6 E. C.
 L. R. 494), 385.
 Quick v. River Forest (130 Ill. 323),
 206.
 Quin v. Lloyd (41 N. Y. 349), 29, 235.
 Quincy Hose R. Co. v. Ganse (Ill., 27
 N. E. Rep. 190), 329.
 Quinlan v. Utica (74 N. Y. 603), 8, 14.
- R.**
- Race v. People (63 N. Y. 277), 87.
 Radcliff v. United Ins. Co. (7 Johns.
 51), 291.
 Rader v. McElvin (21 Oreg. 56), 181.
 Rahan v. Deig (121 Ind. 283), 329.
 Railway Co. v. Allerton (18 Wall.
 233), 244.

The references are to pages.

- | | |
|--|--|
| <p>Railway Co. v. Hill (Tex., 16 S. W. Rep. 936), 108.</p> <p>Railway Co. v. Pollard (22 Wall. 341), 67.</p> <p>Rains v. State (88 Ala. 91), 329.</p> <p>Ralm v. State (30 Tex. App. 310), 55.</p> <p>Ramming v. Caldwell (43 Ill. App. 175), 186.</p> <p>Rand v. Johns (Tex., 15 S. W. Rep. 200), 165.</p> <p>Randall v. Richmond & D. R. Co. (107 N. C. 148), 427.</p> <p>Randolph v. Lane (57 Ind. 115), 135.</p> <p>Rankins v. Amazon Ins. Co. (89 Cal. 203), 214.</p> <p>Rau v. People (63 N. Y. 277), 93.</p> <p>Rauson v. McCurley (140 Ill. 626), 14.</p> <p>Rawson v. Plaisted (151 Mass. 71), 335.</p> <p>Ray v. Ball (24 Ill. 444), 22.</p> <p>Ray v. Rowley (1 Hun, 614), 420.</p> <p>Rayburn v. Eldod (43 Ala. 700), 319.</p> <p>Raymond v. Longworth (4 McLean, 481), 129.</p> <p>Raymond v. Richardson (4 E. D. Smith, 171), 35.</p> <p>Read v. Clark's Cove Guano Co. (47 Hun, 410), 225.</p> <p>Reagan v. Aiken (133 U. S. 109), 55.</p> <p>Reast v. McDonald (Tex., 19 S. W. Rep. 795), 409.</p> <p>Re Ashton (1892, p. 82; 45 Alb. L. J. 335), 155.</p> <p>Re Benson (16 N. Y. Supp. 111), 56.</p> <p>Re Bernsee's Will (63 Hun, 628), 80.</p> <p>Re Berrin's Will (58 Hun, 610), 80.</p> <p>Re Blood's Estate (Vt., 19 Atl. Rep. 770), 389.</p> <p>Re Brown (59 Hun, 623), 82.</p> <p>Re Brown's Estate (Vt., 26 Atl. Rep. 638), 302.</p> <p>Re Budlong's Will (67 Hun, 408), 51, 83.</p> <p>Re Budlong's Will (54 Hun, 131), 83.</p> <p>Re Consalus (95 N. Y. 340), 234.</p> <p>Re Crosby v. Day (81 N. Y. 242), 375.</p> <p>Re Darragh (52 Hun, 591), 58.</p> <p>Re Davis' Estate (10 Mont. 228), 435.</p> | <p>Re Dula's Succession (La. Ann., 10 S. W. Rep. 406), 260.</p> <p>Re Dunham's Will (131 N. Y. 575), 80.</p> <p>Re Edson's Will (70 Hun, 122), 392.</p> <p>Re Gilmore's Estate (154 Pa. St. 523), 157.</p> <p>Re Gorry (48 Hun, 29), 97.</p> <p>Re Hall (12 Ch. L. N. 12), 447.</p> <p>Re Holmes' Will (32 N. Y. State Rep. 902), 457.</p> <p>Re Huss (126 N. Y. 537), 439.</p> <p>Re Jordan (49 Fed. Rep. 238), 87.</p> <p>Re Keeler's Estate (Pa., 30 W. N. C. 419), 442.</p> <p>Re King (41 Fed. Rep. 905), 95.</p> <p>Re Klock (49 Hun, 450), 386.</p> <p>Re Lamb's Will (18 N. Y. Supp. 173), 54.</p> <p>Re Le Sax's Will (131 N. Y. 624), 80.</p> <p>Re Lowenstein's Estate (51 N. Y. State Rep. 423), 56.</p> <p>Re Mason (60 Hun, 46), 376.</p> <p>Re McCarthy (55 Hun, 71), 51, 54.</p> <p>Re Merchant's Estate (3 N. Y. Supp. 875), 85.</p> <p>Re Meyers (131 N. Y. 409), 247.</p> <p>Re Miller's Estate (30 N. Y. State Rep. 212), 446.</p> <p>Re Peck's Will (42 N. Y. State Rep. 898), 56.</p> <p>Re Perkins' Estate (Vt., 26 Atl. Rep. 637), 186.</p> <p>Re Potter's Will (33 N. Y. State Rep. 936), 457.</p> <p>Re Rebman (41 Fed. Rep. 87), 94.</p> <p>Re Rhodes' Estate (10 Pa. Co. Ct. 386), 442.</p> <p>Re Robb's Estate (37 S. C. 19), 157, 284.</p> <p>Re Schneider (D. C., 21 Wash. L. Rep. 323), 388.</p> <p>Re Sheldon's Will (40 N. Y. State Rep. 369), 251, 418.</p> <p>Re Slinn (L. R. 15 P. D. 156), 204.</p> <p>Re Smith's Will (61 Hun, 101), 54.</p> <p>Re Snelling's Will (36 N. Y. 315), 371.</p> <p>Re Split Rock Cable Road Co. (128 N. Y. 408), 241.</p> |
|--|--|

The references are to pages.

- Re Starkie's Appeal (61 Conn. 199), 354.
- Re Tobin (40 N. Y. State Rep. 366), 419.
- Re Whitlock (51 Hun, 351), 52.
- Re Williams (64 Hun, 163), 104, 111.
- Re Wood's Will (32 N. Y. State Rep. 286), 449.
- Re Wormley's Estate (137 Pa. St. 101), 262.
- Rechmuller v. Philadelphia F. Ass'n (38 Mo. App. 118), 214.
- Redewell v. Gillam (4 N. M. 78), 229.
- Redfield v. Stilt (10 N. Y. State Rep. 367), 85.
- Reed v. Bank of Attica (124 N. Y. 671), 188.
- Reed v. Insurance Co. (95 U. S. 23), 148.
- Reed v. Jackson (1 East, 355), 279.
- Reed v. McConnel (17 Week. Dig. 575), 365.
- Reed v. McConnell (101 N. Y. 270), 396.
- Reed v. Murray (Cal., 24 Pac. Rep. 841), 282.
- Reed v. Nicholson (37 Mo. App. 646), 188.
- Reed v. Rome, W. & O. R. Co. (48 Hun, 231), 478.
- Reese v. Wood (5 B. & S. 364), 67.
- Reeves v. Boneville (5 Del. Ch. 1), 441.
- Reeves v. Brayton (36 S. C. 384), 209.
- Reffell v. Reffell (L. R. 1 P. & D. 139), 143.
- Reg. v. Bedingfield (14 Cox's Cr. Cas. 341), 324.
- Reg. v. Heaton (Lewin's C. C. 116), 472.
- Reg. v. Horne Tooke (25 St. Tri. 71), 402.
- Reg. v. Mullins (3 Cox's Cr. Cas. 526), 506.
- Reg. v. Thompson (1894, 2 Q. B. 12), 114.
- Reid v. Jordan (56 Ga. 62), 99, 417.
- Reid v. Wilson (41 N. J. L. 29), 92.
- Reinhardt v. Mentasti (Eng. Ch. Div., 61 L. T. Rep. (N. S.) 328; 40 Alb. L. J. 490), 230.
- Reliance Lumber Co. v. Western U. T. Co. (58 Tex. 394), 130.
- Remock v. Butterfield (31 N. H. 70), 247.
- Rensen v. Wheeler (121 N. Y. 685), 213.
- Renard v. Sampson (12 N. Y. 561), 184.
- Resp v. Gibbs (3 Yates, 429), 49.
- Retan v. Lake S. & M. S. R. Co. (94 Mich. 146), 385.
- Reynolds v. Haywood (59 N. Y. 47), 506.
- Reynolds v. Iowa & N. Ins. Co. (80 Iowa, 563), 328.
- Reynolds v. Reynolds (13 Ky. L. Rep. 793), 251.
- Reynolds v. Robinson (18 N. Y. 235), 201.
- Reynolds v. Robinson (64 N. Y. 589), 367.
- Reynolds v. Shaffer (90 Mich. 494; 30 Am. St. Rep. 492), 75.
- Rex v. Bedfordshire (4 E. & B. 541), 277.
- Rex v. Bingham (Horsham St. Ass'n, 1811), 461.
- Rex v. Bliss (7 Ad. & El. 55), 279.
- Rex v. Brain (6 C. & P. 350), 465.
- Rex v. Burdette (4 B. & Ald. 23), 462.
- Rex v. Erith (8 East, 524), 286.
- Rex v. Gesburn (15 East, 57), 127.
- Rex v. Hood (1 Wood's Cr. Cas. 281), 75.
- Rex v. Jones (2 Camp. 121), 96.
- Rex v. Leight (10 Ad. & El. 398), 279.
- Rex v. Llanfaethly (2 E. & B. 940), 128.
- Rex v. Luppe (8 East, 202), 92.
- Rex v. Show (Lewin's C. C. 116), 472.
- Rex v. Sutton (8 A. & E. 516), 279.
- Rex v. Watson (2 Stark. 129), 121, 128.
- Rex v. Withers (5 T. R. 442), 90.
- Rex v. Worth (4 Q. B. 132), 300.

The references are to pages.

- Rhoades v. Selim (4 Wash. C. C. 715), 115, 132.
- Rhodes v. McLean (101 Ill. 467), 136.
- Rhyher v. Carver (84 Wis. 97), 155.
- Rice v. Barrett (116 Mass. 312), 509.
- Rice v. Mead (24 How. Pr. 445), 92.
- Rice v. Sayles (23 Ill. App. 189), 419.
- Rice v. Shook (27 Ark. 137), 91.
- Rich v. Flanders (39 N. H. 304), 104.
- Rich v. Forsyth (41 Md. 389), 206.
- Rich v. Rich (16 Wend. 663), 29.
- Rich v. Sowles (64 Vt. 408), 247.
- Richards v. Barrett (10 B. & C. 160), 280.
- Richards v. Day (137 N. Y. 183), 42.
- Richards v. Hene (30 Neb. 259), 271.
- Richards v. Michigan C. R. Co. (40 Fed. Rep. 165), 93.
- Richards v. State (36 Neb. 188), 331.
- Richards v. State (Neb., 36 N. W. Rep. 1027), 501.
- Richards v. State (82 Wis. 172), 138.
- Richardson's Appeal (132 Pa. St. 292), 436.
- Richardson v. Davis (70 Miss. 219), 9.
- Richardson v. Northrop (66 Barb. 85), 370.
- Richee v. Carpenter (Wash., 28 Pac. Rep. 380), 420.
- Richey v. Daenicke (86 Mich. 647), 206.
- Richmond's Appeal (59 Conn. 226), 386.
- Richmond v. Thomaston (38 Me. 232), 323.
- Richmond & D. R. Co. v. Hissong (Ala., 13 S. Rep. 209), 137.
- Richmond & D. R. Co. v. Shomo (90 Ala. 74), 185.
- Richmond & D. R. Co. v. Yeamans (86 Va. 860), 422.
- Richter v. Harper (95 Mich. 221), 474.
- Rico R. & M. Co. v. Musgrove (Colo., 23 Pac. Rep. 458), 313.
- Ridden v. Thrall (125 N. Y. 572), 239.
- Rider v. Alton, etc. R. Co. (13 Ill. 516), 317.
- Rider v. Hulse (24 N. Y. 372), 264.
- Rider v. Miller (86 N. Y. 507), 365.
- Ridgeley v. Johnson (11 Barb. 527), 289.
- Riendeau v. Ritter (12 Wall. 317), 402.
- Rigdon v. Conley (141 Ill. 565), 154.
- Riggs v. Powell (142 Ill. 453), 313.
- Riggs v. Tayloe (9 Wheat. 483), 128.
- Riley v. State (88 Ala. 193), 406.
- Rindskoff v. Myers (77 Wis. 649), 390.
- Ringhouse v. Keever (49 Ill. 470), 289.
- Riordan v. Ocean Steamship Co. (124 N. Y. 655), 423.
- Riordan v. Minter (5 M. & G. 204), 409.
- Ripley v. Seligman (88 Mich. 108), 205.
- Ripley v. Seligman (88 Mich. 177), 248.
- Risley v. Wightman (13 Hun. 163), 218.
- Ritchie v. Carpenter (2 Wash. 512), 460.
- Rittenhouse v. Independent Line of Tel. (44 N. Y. 263), 223.
- Rivers v. Rivers (36 S. C. 302), 252.
- Robb v. Hackley (23 Wend. 50), 7, 18.
- Robbins v. Fuller (24 N. Y. 570), 273.
- Roberts v. Bonaparte (73 Md. 191), 175.
- Roberts v. Cook (68 Ga. 325), 417.
- Roberts v. Daxen (Peake, 116), 129.
- Roberts v. Demens Wood-Working Co. (111 N. C. 432), 487.
- Roberts v. Dixon (50 Kan. 432), 131.
- Roberts v. Kendall (3 Ind. App. 339), 350.
- Roberts v. New York El. R. Co. (128 N. Y. 455), 377.
- Roberts v. New York El. R. Co. (128 N. Y. 499), 476.
- Roberts v. People (19 Mich. 401), 450.
- Robertson v. Craver (Iowa, 55 N. W. Rep. 492), 14.
- Robertson v. Du Bose (76 Tex. 1), 136.
- Robertson v. Jackson (2 C. B. 412), 172.
- Robertson v. Powell (158 Mass. 94), 189.
- Robertson v. Teal (9 Tex. 344), 91.

The references are to pages.

- Robinson v. Cushman (2 Denio, 149), 106.
- Robinson v. Frost (14 Barb. 536), 25.
- Robinson v. Hardy (22 Ill. App. 512), 192.
- Robinson v. Hoyer (103 Mo. 410), 269.
- Robinson v. Moseley (93 Ala. 70), 209.
- Robinson v. Penn Plow & W. Co. (1 Okla. 140), 474.
- Robinson v. Smith (111 Mo. 205), 305.
- Robinson v. Taylor (42 Fed. Rep. 803), 436.
- Robinson v. Waupaca (77 Wis. 544), 384.
- Robinson v. Woodmansee (80 Ga. 549), 353.
- Robinson v. Yarrow (7 Taunt. 455), 510.
- Roche v. Brooklyn City, etc. R. Co. (105 N. Y. 294), 331.
- Rochester, etc. Co. v. Loomis (45 Hun, 94), 513.
- Rock Island v. Cuinely (126 Ill. 408), 98.
- Rock Island v. Steel (31 Ill. 545), 92.
- Rock Island First Nat. Bank v. Anderson (28 S. C. 43), 188.
- Rock Island & P. R. Co. v. Potter (36 Ill. 540), 11, 356.
- Rockwell v. Brown (54 N. Y. 572), 240.
- Rockwell v. Geary (4 Hun, 611), 250.
- Rodgers v. Cook (Ala., 12 S. Rep. 108), 130.
- Rodgers v. Retler (12 Wall. 317), 402.
- Rodney v. Wilson (76 Mo. 123), 199.
- Rodrian v. N. Y., N. H. & H. R. R. Co. (125 N. Y. 536), 425.
- Rodrigues v. Hayes (76 Tex. 225), 457.
- Roe v. Hanson (5 Lans. 305), 483.
- Roe v. Swezey (10 Barb. 251), 40, 250.
- Roeber v. Bowe (30 Hun, 379), 329.
- Rogers v. Anson (42 Hun, 436), 366.
- Rogers v. Moore (10 Conn. 13), 22.
- Rogers v. Verona (1 Bosw. 417), 36.
- Rogers v. Weir (34 N. Y. 463), 510.
- Rogers v. Zook (86 Ind. 237), 455.
- Rollins v. Pueblo County Com'rs (15 Colo. 103), 177.
- Romack v. Hobbs (Ind., 32 N. E. Rep. 307), 381.
- Romero v. United States (1 Wall. 721), 102.
- Romeyn v. Sickles (108 N. Y. 650), 9.
- Romig v. Romig (2 Rawle (Pa.), 241), 117.
- Root v. Chandler (10 Wend. 110), 29.
- Roreback v. Pennsylvania R. Co. (58 Conn. 292), 372.
- Rose v. Louisville, N. O. & T. R. Co. (70 Miss. 87), 474.
- Roseboom v. Billington (17 Johns. 182), 117.
- Rosenbaum v. State (33 Ala. 354), 20.
- Rosevelt v. New York El. R. Co. (109 N. Y. 301), 497.
- Rosevelt v. New York El. R. Co. (57 N. Y. Supr. Ct. 438), 476.
- Ross v. Anstell (2 Cal. 183), 91.
- Ross v. Boswell (60 Ind. 235), 94.
- Ross v. Drinkard (35 Ala. 434), 432.
- Ross v. Read (1 Wheat. 482), 125.
- Ross v. Reddick (2 Ill. 73), 95.
- Rosseau v. Bleau (131 N. Y. 177), 55.
- Roth v. Hamburg A. P. Co. (59 N. Y. Supr. Ct. 49), 427.
- Rouch v. Caldbeck (64 Vt. 593), 497.
- Round Lake Ass'n v. Kellogg (58 Hun, 605), 204.
- Rouse v. Whited (25 N. Y. 170), 117, 495.
- Routledge v. Worthington Co. (119 N. Y. 592), 175.
- Rowe v. Jerome (18 Conn. 138), 105.
- Rowland v. Barton (2 Harr. (Del.) 288), 305.
- Rowland v. McCown (20 Oreg. 538), 282.
- Rowley v. L. & N. W. Ry. (L. R. 8 Ex. 221), 360.
- Ruckman v. Cowell (1 N. Y. 505), 28.
- Rudd v. Robinson (126 N. Y. 113), 317.
- Rudd v. Rounds (64 Vt. 432), 13.
- Rudy v. Com. (128 Pa. St. 500), 231.
- Ruggles v. Sandwick (6 Minn. 626), 199.

The references are to pages.

- Ruggles v. Lawson (13 Johns. 285), 451.
 Rusk v. Lownie (3 H. & J. 97), 301.
 Russ v. Wabash Western R. Co. (112 Mo. 45), 371.
 Russell v. Andrae (84 Wis. 530), 9.
 Russell v. Andre (Wis., 45 N. W. Rep. 117), 204.
 Russell v. Barry (115 Mass. 300), 143.
 Russell v. Coffin (8 Pick. 143), 22.
 Russell v. Davis (Minn., 53 N. W. Rep. 766), 153.
 Russell v. Erwin (41 Ala. 292), 195.
 Russell v. Hallett (23 Kan. 276), 447.
 Russell v. Hubbard (6 Barb. 654), 267.
 Russell v. Jackson (22 Wend. 276), 287.
 Russell v. Jackson (15 Jur. 1117), 50.
 Ruston's Case (1 Leach Cr. Cas. 408), 140.
 Rutherford v. Schattman (119 N. Y. 604), 348.
 Rutledge v. Hudson (80 Ga. 266), 352.
 Rutledge v. M. P. R. Co. (Mo., 19 S. W. Rep. 38), 409.
 Ryan v. Lanes (12 Q. B. 460), 439.
 Ryan v. People (79 N. Y. 594), 48.
 Ryan v. Porter Mfg. Co. (57 Hun, 253), 342.
 Ryan v. State (83 Mich. 486), 406.
 Ryers v. Wheeler (22 Wend. 148), 149, 253.
- S.**
- Sachet v. May (3 Dana, 80), 29.
 Sackrider v. Saginaw County Sup'rs (79 Mich. 59), 122.
 Sage v. State (127 Ind. 15), 315.
 Sager v. Dorr (51 Hun, 642), 85.
 Salazar v. Longwell (N. M., 25 Pac. Rep. 927), 460.
 Salisbury v. Schuyler S. T. B. Line (22 N. Y. Week. Dig. 185), 365.
 Salter v. Ham (31 N. Y. 321), 39.
 Saltonstall's Case (1 Rogers' Rec. 134), 49.
 Sammis v. Wightman (31 Fla. 10), 89.
 Sample v. Frost (10 Iowa, 266), 50.
 Sample v. Hogar (27 Cal. 163), 94.
 San Antonio & A. P. R. Co. v. Bennett (76 Tex. 151), 364.
 Sandberg v. Palm (Minn., 54 N. W. Rep. 1109), 109.
 Sanders v. Gallagher (Minn., 53 N. W. Rep. 600), 487.
 Sanderson v. Caldwell (45 N. Y. 395), 28.
 Sanderson v. Coleman (4 M. & G. 209), 510.
 Sandford v. Sandford (5 Lans. 486), 251.
 San Francisco R. Co. v. Compton (75 Tex. 667), 491.
 Sanger v. Merritt (120 N. Y. 109), 135.
 Saratoga Bank v. Leach (37 Hun, 336), 84.
 Sargeant v. Fuller (132 Pa. St. 127), 419.
 Sargeant v. Hampden (38 Me. 581), 50.
 Sassur v. Farmers' Bank (4 Md. 409), 91.
 Sauerbier v. Union Cent. L. Ins. Co. (39 Ill. App. 620), 155.
 Sauhegan Nat. Bank v. Beardman (46 Minn. 293), 151.
 Sauter v. Scrutchfield (28 Mo. App. 150), 458.
 Savannah v. Dickey (33 Mo. App. 522), 98.
 Savannah, F. & W. R. Co. v. Harris (42 Am. & Eng. R. Cas. 457), 230.
 Savannah, F. & W. R. Co. v. Holland (82 Ga. 257), 323.
 Sax v. Davis (81 Iowa, 692), 328.
 Sayward v. Stevens (3 Gray, 97), 192.
 Scagel v. Chicago, M. & St. P. R. Co. (83 Iowa, 380), 404.
 Scalf v. Collins County (80 Tex. 514), 386.
 Scaman v. Koehler (122 N. Y. 646), 89.
 Scammon v. Scammon (33 N. H. 52), 111.
 Scanlon v. Wright (13 Pick. 523), 122..

The references are to pages.

- Scarborough v. Alcorn (74 Tex. 358), 187.
 Schaffner v. Reuter (37 Barb. 44), 62.
 Schaller v. State (14 Mo. 502), 16.
 Schermerhorn v. Tyler (11 Hun, 549), 371.
 Schermerhorn v. Van Allen (18 Barb. 29), 39.
 Scheufler v. Grand Lodge A. O. U. W. (20 Ins. L. J. 241), 230.
 Scheufler v. Grand Lodge A. O. U. W. (45 Minn. 256), 243.
 Schiller v. Stevens (100 Mass. 518), 172.
 Schlereth v. Missouri P. R. Co. (Mo., 21 S. W. Rep. 1110), 381.
 Schlessinger v. Springfield F. & M. Ins. Co. (58 N. Y. Supr. Ct. 112), 479.
 Schley v. Jones (131 Pa. St. 62), 429.
 Schmick v. Noel (72 Tex. 1), 390.
 Schmidt v. Boyer (Neb., 45 N. W. Rep. 265), 352.
 Schmidt v. Keehn (126 N. Y. 523), 437.
 Schmitz v. Schreeve (1 Am. Rep. 439), 272.
 Schmohl v. Fiddick (34 Ill. App. 190), 149.
 Schneider v. Second Ave. R. Co. (133 N. Y. 533), 369.
 Schreiber v. Schreiber (52 N. Y. State Rep. 436), 21.
 Schreyer v. Scott (134 U. S. 405), 435.
 Schroeder v. Frey (131 N. Y. 562), 149.
 Schubkagel v. Dierstein (131 Pa. St. 46), 54.
 Schuey v. Schaeffer (130 Pa. St. 16), 437.
 Schuler v. Third Ave. R. Co. (44 N. Y. State Rep. 774), 395.
 Schurr v. Newport & B. S. I. Co. (45 N. Y. State Rep. 645), 244.
 Schutz v. Jordan (141 U. S. 213), 458.
 Schuylkill River & S. R. Co. v. Stoker (128 Pa. St. 233), 480.
 Schwander v. Birge (46 Hun, 66), 358.
 Schwartz v. Hersker (140 Pa. St. 550), 103.
 Schwartz v. Wood (67 Hun, 648), 409.
 Schwersenski v. Vineberg (19 Can. Sup. Ct. 243), 207.
 Schwinger v. Raymond (105 N. Y. 648), 370.
 Scofield v. Jones (85 Ga. 816), 151.
 Scofield v. Spaulding (54 Hun, 523), 335.
 Scott v. Chope (33 Neb. 41), 290.
 Scott v. Hartley (126 Ind. 239), 162.
 Scott v. Lillienthal (9 Bosw. 224), 34.
 Scott v. Ratliffe (5 Pet. 81), 285.
 Scott v. Wood (81 Cal. 398), 212.
 Scott v. Yard (46 N. J. Eq. 79), 191.
 Scrogin v. Wood (Iowa, 54 N. W. Rep. 437), 208.
 Scully v. Book (3 Wash. 182), 9.
 Seabury v. Bolles (52 N. J. L. 413), 270.
 Seaman v. Koehler (122 N. Y. 646), 89.
 Seaman v. Lew (5 Barb. 337), 37.
 Sears v. Kings County El. R. Co. (152 Mass. 151), 177.
 Sears v. Kings County El. R. Co. (156 Mass. 440), 450.
 Sears v. Seattle Con. Street Co. (Wash., 33 Pac. Rep. 389), 381.
 Seattle Land Co. v. Day (2 Wash. 451), 138.
 Seattle & M. R. Co. v. Gilchrist (4 Wash. 509), 475.
 Sebrell v. Barrows (36 W. Va. 212), 372.
 Seese v. Northern P. R. Co. (39 Fed. Rep. 487), 332.
 Seibert v. People (143 Ill. 571), 504.
 Seidenbach v. Riley (111 N. Y. 560), 25.
 Seitz v. Brewers' Refrigerating & M. Co. (141 U. S. 510), 188.
 Seller v. Carpenters (33 Me. 485), 131.
 Selma, etc. R. Co. v. Keith (53 Ga. 178), 484.
 Selma, R. & D. R. Co. v. United States (139 U. S. 560), 213.

The references are to pages.

- Selover v. Coe (33 N. Y. 443), 40, 250.
 Semple v. Hogar (27 Cal. 163), 94.
 Senn v. Southern R. Co. (108 Mo. 142), 373.
 Serat v. Smith (15 N. Y. Supp. 330), 179.
 Serfass v. Driesbach (141 Pa. St. 142), 214.
 Sessmore v. United States (93 U. S. 605), 259.
 Severson v. Klemschmidt (Mont., 26 Pac. Rep. 198), 65.
 Seventh Day B. M. F. v. Saunders (84 Wis. 109), 180.
 Seville v. State, Ohio (49 Ohio St. 117), 348.
 Seybolt v. N. Y., L. E. & W. R. Co. (95 N. Y. 562), 219.
 Seymour v. Cowing (1 Keyes, 532), 202.
 Shaak v. Meily (106 Pa. St. 161), 79.
 Shad v. Livingston (31 Tex. 89), 205.
 Shadden v. Hambree (17 Oreg. 14), 257.
 Shain v. Forbes (82 Cal. 577), 78.
 Shannon v. Minney (130 Pa. St. 280), 335.
 Sharon v. Sharon (79 Cal. 633), 50, 63.
 Sharp v. Freeman (45 N. Y. 802), 250.
 Shaw v. Jacobs (Iowa, 55 N. W. Rep. 333), 166.
 Shaw v. Starr (75 Tex. 411), 341.
 Sheahan v. Nat. Steamship Co. (66 Hun, 48), 496.
 Shear v. Van Dyke (10 Hun, 528), 312.
 Sheehan v. Hennessey (65 N. H. 101), 81.
 Sheil v. Muir (22 N. Y. State Rep. 829), 85.
 Sheil v. Stark (14 Ga. 429), 128.
 Shelby v. Claggett (46 Ohio St. 549), 394.
 Sheldon v. Benham (4 Hill, 129), 403.
 Sheldon v. Ferris (45 Barb. 128), 445.
 Sheldon v. Payne (7 N. Y. 453), 268.
 Sheldon v. Sheldon (133 N. Y. 1), 54.
 Sheldon v. Wright (7 Barb. 39), 417.
 Shell v. Muer (22 N. Y. State Rep. 829), 85.
 Shelly v. Austin (76 Tex. 608), 364.
 Shepherd v. Hill (Mass., 24 N. E. Rep. 1025), 164.
 Sheppard v. Giddings (22 Conn. 282), 129.
 Sherman v. Elder (24 N. Y. 381), 31.
 Sherman v. Hoagland (54 Ind. 578), 228.
 Sherman v. Oneonta (59 Hun, 294), 329.
 Sherman Center Town Co. v. Leonard (46 Kan. 354), 478.
 Sherpey v. Evansville T. H. Co. (121 Ind. 427), 382.
 Shields v. Smith (104 N. C. 57), 79.
 Shiffer v. Adams (13 Colo. 572), 242.
 Shifftell's Case (14 Gratt. 652), 115.
 Shiner v. Abbey (77 Tex. 1), 330.
 Shinker v. Haagsma (99 Mo. 208), 151.
 Shoemaker v. Benedict (11 N. Y. 176), 269.
 Shorter v. Cunningham (87 Cal. 209), 131.
 Show v. McGregory (105 Mass. 96), 271.
 Shrewsbury Peerage (7 H. L. C. 1), 289.
 Shughart v. Moore (78 Pa. St. 469), 143.
 Shuler v. Third Ave. R. Co. (48 N. Y. State Rep. 663), 380.
 Shulters v. Johnson (38 Barb. 80), 254.
 Shultz v. Hoagland (85 Mo. 464), 296.
 Shuttleworth v. Winter (55 N. Y. 629), 264.
 Sibley v. Waffle (16 N. Y. 180), 50.
 Sickles v. Mather (20 Wend. 72), 306.
 Sidney School Furniture Co. v. Mar-san Tp. S. D. (130 Pa. St. 76), 207.
 Sientes v. Odier (17 La. Ann. 153), 195.
 Sill v. Reese (47 Cal. 294), 107.
 Silliman v. Tuttle (45 Barb. 171), 193.
 Silver v. Missouri P. R. Co. (Mo., 13 S. W. Rep. 410), 213.

The references are to pages.

- Silvers v. Potter (48 N. J. Eq. 539), 179.
- Simis v. N. Y., L. E. & W. R. Co. (48 N. Y. State Rep. 687), 185.
- Simmons v. Lyons (55 N. Y. 671), 30.
- Simms v. Express Co. (38 Ga. 129), 99.
- Simon v. Richard (42 La. Ann. 842), 439.
- Simonds v. Partridge (154 Mass. 500), 82.
- Simons v. Hasans (101 N. Y. 427), 85.
- Simons v. Ypsilanti Paper Co. (77 Mich. 185), 213.
- Simpson v. Norton (45 Me. 281), 131.
- Simpson v. Simpson (107 N. C. 552), 82.
- Simser v. Cowen (56 Barb. 395), 31.
- Singleton v. Phoenix Ins. Co. (132 N. Y. 298), 424.
- Sioux Valley State Bank v. Kellogg (81 Iowa, 124), 328.
- Sipperly v. Steward (50 Barb. 62), 154.
- Sire v. Rumbolt (39 N. Y. State Rep. 85), 252.
- Sistare v. Alcott (15 N. Y. State Rep. 248), 368.
- Sixth Ave. R. Co. v. Metropolitan El. R. Co. (138 N. Y. 548), 475.
- Skeels v. Starrett (57 Mich. 350), 187.
- Skeels v. Starrett (57 Mich. 392), 4.
- Skellie v. Central R. & Bkg. Co. (81 Ga. 56), 10.
- Skenandoa Cotton Co. v. Lefferts (59 Hun, 620), 181.
- Slaney v. Wade (7 Sim. 595), 288.
- Slicer v. Bank of Pittsburgh (16 How. (U. S.) 571), 421.
- Slight v. Hartshorn (2 Johns. 531), 172.
- Slingerland v. Norton (58 Hun, 578), 64.
- Slocum v. Warren (10 R. I. 124), 243.
- Small v. Williams (87 Ga. 681), 327.
- Smalley v. Appleton (75 Wis. 18), 363.
- Smedberg v. Whittlesey (3 Sandf. Ch. 320), 33.
- Smiley v. Fries (104 Ill. 416), 434.
- Smith v. Abair (87 Mich. 62), 263.
- Smith v. Arthur (110 N. C. 400), 179.
- Smith v. Boyer (Neb., 45 N. W. Rep. 265), 269.
- Smith v. Clews (114 N. Y. 190), 157.
- Smith v. Coffin (18 Me. 157), 68.
- Smith v. Coleman (77 Wis. 343), 175.
- Smith v. Collins (82 Wis. 455), 304.
- Smith v. Collins (94 Ala. 394), 11, 304.
- Smith v. Collins (115 Mass. 388), 271, 272.
- Smith v. Combs (49 N. J. Eq. 420), 442.
- Smith v. Crego (54 Hun, 620), 52.
- Smith v. Dare (48 Kan. 416), 187.
- Smith v. Des Moines (84 Iowa, 685), 14.
- Smith v. Dinkelspiel (91 Ala. 528), 199.
- Smith v. Dittman (34 N. Y. State Rep. 303), 342.
- Smith v. Easton (54 Md. 138), 136.
- Smith v. Ferris (1 Daly, 18), 510.
- Smith v. Floyd (18 Barb. 392), 166.
- Smith v. Gibbs (44 N. H. 335), 166.
- Smith v. Gillum (80 Tex. 120), 335, 447.
- Smith v. Hollister (32 Vt. 695), 28.
- Smith v. Holyoke (112 Mass. 517), 135.
- Smith v. Kemp (92 Mich. 357), 180.
- Smith v. Kennedy (13 Hun, 9), 264.
- Smith v. Kimball (62 N. H. 606), 154, 254.
- Smith v. Knowlton (11 N. H. 191), 259.
- Smith v. Leafman (145 Pa. St. 628), 354.
- Smith v. Levinas (8 N. Y. 472), 39.
- Smith v. Maine (25 Barb. 33), 300.
- Smith v. Martin (17 Conn. 399), 296.
- Smith v. Miller (43 N. Y. 171), 91.
- Smith v. Mongoga (3 N. M. 39), 420.
- Smith v. Mott (70 Hun, 597), 318.
- Smith v. Nat. Ben. Soc. (123 N. Y. 85), 225, 353.
- Smith v. N. Y. C. & H. R. R. Co. (118 N. Y. 645), 423.
- Smith v. Ogelvie (127 N. Y. 143), 435.
- Smith v. Owens (21 Cal. 11), 29.
- Smith v. Palmer (6 Cush. 513), 103.
- Smith v. People (2 Mich. 415), 21.
- Smith v. Porter (10 Gray, 66), 434.
- Smith v. Rentz (131 N. Y. 169), 133.

The references are to pages.

- Smith v. Roberts (43 Minn. 342), 192.
 Smith v. Ryan (66 N. Y. 352), 218.
 Smith v. Satterlee (130 N. Y. 677), 64.
 Smith v. Sergeant (2 Hun, 107), 249.
 Smith v. Shanck (18 Barb. 344), 105.
 Smith v. Smith (49 Ala. 156), 443.
 Smith v. Smith (1 Edw. Ch. 191), 255.
 Smith v. Smith (117 Mass. 72), 245.
 Smith v. Smith (157 Mass. 389), 387.
 Smith v. Smith (81 Tex. 45), 204.
 Smith v. State (37 Ala. (N. S.) 472), 505.
 Smith v. State (38 Ga. 627), 114.
 Smith v. Sun P. & P. Ass'n (55 Fed. Rep. 240), 474.
 Smith v. Taylor (82 Cal. 533), 147.
 Smith v. Tosini (S. D., 48 N. W. Rep. 299), 419.
 Smith v. Traders' Nat. Bank (82 Tex. 368), 132.
 Smith v. Tucker (2 E. D. Smith, 193), 452.
 Smith v. United States (5 Pet. 292), 129.
 Smith v. Young (1 Camp. 439), 199.
 Smith v. Young (26 Mo. App. 576), 479.
 Sneathen v. Sneathen (104 Mo. 201), 459.
 Snodgrass v. Caldwell (90 Ala. 319), 275.
 Snodgrass v. Commonwealth (17 Va. L. J. 341), 505.
 Snow v. Alley (151 Mass. 14), 188.
 Snyder v. Fielder (139 U. S. 479), 81.
 Snyder v. Nations (5 Blackf. 295), 66.
 Snyder v. Witner (82 Iowa, 652), 405.
 Soaps v. Eschberg (42 Ill. App. 375), 103.
 Soloman v. Hopkins (61 Conn. 47), 194.
 Sourwine v. Claypool (138 Pa. St. 126), 239.
 Southerland v. Wilmington & W. R. Co. (106 N. C. 100), 327.
 Southern Ins. Co. v. Wolverton Hardware Co. (Tex., 19 S. W. Rep. 615), 455.
 Southern Kansas R. Co. v. Pavay (48 Kan. 452), 319.
 Southern Kansas R. Co. v. Robbins (43 Kan. 145), 382.
 South Missouri Land Co. v. Jeffries (40 Mo. App. 360), 94.
 Southwick v. First Nat. Bank (84 N. Y. 420), 25.
 Southwick v. Southwick (49 N. Y. 510), 61.
 Sparks v. Brown (46 Mo. App. 529), 159, 370.
 Sparks v. Rowles (17 Ala. 211), 198.
 Spaulding v. Albin (63 Vt. 148), 353.
 Spaulding v. Arnold (125 N. Y. 194), 439.
 Spaulding v. Vandercook (2 Wend. 432), 198.
 Spaulding v. Vincent (24 Vt. 501), 127.
 Spears v. Barton (31 Miss. 554, 557), 289, 442.
 Spears v. Richardson (37 N. H. 23), 360.
 Spellman v. Lincoln Rapid Tran. Co. (36 Neb. 19), 221.
 Spellman v. Richmond & D. R. Co. (35 S. C. 475), 408.
 Spencer v. Citizens' Mut. L. Ins. Co. (52 N. Y. State Rep. 442), 511.
 Spencer v. N. Y. & N. E. R. Co. (62 Conn. 242), 336.
 Spencer v. State (20 Ala. 24), 106.
 Spiers v. Parker (1 Term Rep. 141), 26.
 Spiers v. Willison (4 Cranch, 398), 144.
 Spooner v. Keeler (51 N. Y. 527), 28.
 Spotts v. Wabash W. R. Co. (111 Mo. 380), 222.
 Sprague v. Brown (40 Wis. 612), 266.
 Sprague v. Dodge (95 Am. Dec. 535), 225.
 Sprague v. Hasmer (82 N. Y. 466), 198.
 Sprawl v. Lawrence (33 Ala. 106), 95.
 Spriggs v. Moale (28 Md. 497), 259.
 Springer v. Chicago (135 Ill. 552), 108.

The references are to pages.

- Springfield Engine & T. Co. v. Green (25 Ill. App. 106), 245.
- Springstein v. Sampson (32 N. Y. 706), 154.
- Spurrer v. Front Street Cable R. Co. (3 Wash. 659), 379.
- Stafford v. Morning Journal Ass'n (68 Hun, 467), 29.
- Staker v. Begole (Neb., 51 N. W. Rep. 468), 263.
- Stallings v. Gottschalk (Md., 26 Atl. Rep. 524), 199.
- Stallings v. Hinson (49 Ala. 92), 249.
- Stallings v. Hullum (79 Tex. 421), 55.
- Stanford v. Lyon (18 Am. Rep. 736), 256.
- Stanhope v. Swafford (Iowa, 45 N. W. Rep. 403), 208.
- Stanley's Appeal (62 Conn. 325), 387.
- Stanley v. State (26 Ala. 26), 215.
- Star F. Ins. Co. v. Palmer (41 N. Y. Supr. Ct. 267), 27.
- Starkey v. People (17 Ill. 17), 299.
- State v. Ah Lee (18 Oreg. 540), 276.
- State v. Atherton (16 N. H. 203), 122.
- State v. Bailey (1 Pennington, 415), 49.
- State v. Banister (35 S. C. 290), 299.
- State v. Beebe (17 Minn. 241), 60.
- State v. Bedard (Vt., 26 Atl. Rep. 719), 331.
- State v. Best (108 N. C. 747), 286.
- State v. Best (111 N. C. 638), 501.
- State v. Bradley (34 S. C. 136), 298.
- State v. Bradley (64 Vt. 466), 109, 409.
- State v. Brady (107 N. C. 822), 348.
- State v. Brown (31 Me. 520), 216.
- State v. Brown (36 Vt. 560), 216.
- State v. Burchler (103 Mo. 203), 405.
- State v. Campbell (20 Nev. 123), 393.
- State v. Carr (37 Vt. 191), 115.
- State v. Carroll (9 Am. Rep. 469), 267.
- State v. Carroll (36 Conn. 449), 429.
- State v. Centre (35 Vt. 385), 62.
- State v. Chambers (45 La. Ann. 36), 406.
- State v. Chisenhall (106 N. C. 676), 22.
- State v. Clark First Nat. Bank (S. D., 51 N. W. Rep. 789), 99.
- State v. Crabtree (111 Mo. 136), 299.
- State v. Crawford (Mo., 22 S. W. Rep. 371), 505.
- State v. Crow (107 Mo. 341), 138.
- State v. Dalton (27 Mo. 13), 16.
- State v. Davis (29 Mo. 391), 21.
- State v. Davis (27 S. C. 609), 441.
- State v. Dawson (22 Ind. 272), 242.
- State v. Dehlinger (46 Mo. 106), 101.
- State v. Dennis (32 Vt. 158), 18.
- State v. Depoister (Nev., 25 Pac. Rep. 1000), 59.
- State v. De Wolfe (8 Conn. 93), 66.
- State v. Dickinson (41 Wis. 299), 347.
- State v. Donelon (45 La. Ann. 612), 118.
- State v. Dore (10 Iredell, 469), 18.
- State v. Douglass (44 Kan. 618), 16.
- State v. Douglass (48 Mo. App. 39), 409.
- State v. Doyle (107 Mo. 543), 70.
- State v. Dunwall (3 R. I. 480), 95.
- State v. Edwards (2 Nott & McCord, 13), 44.
- State v. Edwards (112 N. C. 901), 409.
- State v. Effinger (44 Mo. App. 81), 93.
- State v. McCoy (111 Mo. 517), 9.
- State v. Elkins (Mo., 14 S. W. Rep. 116), 277.
- State v. Ellwood (17 R. I. 763), 141.
- State v. Euzebe (42 La. Ann. 17), 342.
- State v. Evans (8 Humph. (Tenn.) 110), 92.
- State v. Evans (33 W. Va. 417), 277.
- State v. Fassett (16 Conn. 457), 60.
- State v. Ferguson (107 N. C. 841), 199.
- State v. Findley (101 Mo. 217), 379.
- State v. Fleming (Iowa, 53 N. W. Rep. 234), 36.
- State v. Ford (3 Strobhart, 517), 16.
- State v. Foster (3 Foster, 348), 45.
- State v. Gamble (108 Mo. 500), 420.
- State v. Gedick (43 N. J. L. 86), 347.
- State v. Geer (48 Kan. 752), 267.
- State v. Gibson (21 Ark. 140), 420.
- State v. Ginger (80 Iowa, 574), 377.

The references are to pages.

- State v. Grant (Iowa, 53 N. W. Rep. 120), 350.
- State v. Harr (W. Va., 17 S. E. Rep. 794), 294.
- State v. Harris (45 La. Ann. 42), 504.
- State v. Harris (45 La. Ann. 1007), 388.
- State v. Henderson (Oreg., 32 Pac. Rep. 1030), 325.
- State v. Hilderbrand (105 Mo. 318), 351.
- State v. Hinchman (27 Pa. St. 479), 421.
- State v. Hirsh (Ind., 42 Alb. L. J. 197), 92.
- State v. Holden (42 Minn. 350), 116, 392.
- State v. Holme (54 Mo. 153), 448.
- State v. Howard (9 N. H. 485), 17.
- State v. Howard (32 Vt. 380), 347.
- State v. Howard (102 Mo. 142), 107.
- State v. Howell (100 Mo. 628), 16, 231.
- State v. Hoyt (47 Conn. 518), 63.
- State v. James (31 S. C. 218), 392.
- State v. James (34 S. C. 49), 49.
- State v. Johnson (26 S. C. 152), 297.
- State v. Keith (47 Minn. 559), 437.
- State v. Kirschner (23 Mo. App. 349), 73.
- State v. Lane (64 Mo. 319), 448.
- State v. Lavin (80 Iowa, 555), 64.
- State v. Lee (Iowa, 45 N. W. Rep. 345), 22.
- State v. Leehman (S. D., 49 N. W. Rep. 3), 386.
- State v. Lewis (20 Nev. 333), 441.
- State v. Lewis (107 N. C. 967), 267.
- State v. Lockerby (14 Cr. L. Mag. 915), 23.
- State v. Macek (41 La. Ann. 1079), 22.
- State v. McCoy (111 Mo. 517), 31.
- State v. McGee (81 Iowa, 17), 351.
- State v. McKean (36 Iowa, 343), 505.
- State v. Maier (36 W. Va. 757), 371.
- State v. Masler (2 Ala. 43), 21.
- State v. Mayberry (48 Me. 218), 130.
- State v. Meekins (41 La. Ann. 543), 116.
- State v. Merriman (34 S. C. 16), 396.
- State v. Meyers (99 Mo. 107), 116.
- State v. Minton (Mo., 22 S. W. Rep. 808), 350.
- State v. Mitchell (41 La. Ann. 1073), 23.
- State v. Mitchell (1 Phillips' (N. C.) L. 447), 115.
- State v. Moore (Mo., 22 S. W. Rep. 1086), 114.
- State v. Mooreman (27 S. C. 22), 116.
- State v. Moxley (103 Mo. 378), 395.
- State v. Mulkern (Me., 26 Atl. Rep. 1017), 331.
- State v. Mullins (101 Mo. 514; 41 Alb. L. J. 27), 470.
- State v. Munchrath (78 Iowa, 268), 351.
- State v. Nelson (101 Mo. 477), 298.
- State v. O'Connell (82 Me. 30), 407.
- State v. O'Neal (4 Iredell, 88), 17.
- State v. O'Neal (7 Iredell, 251), 16.
- State v. Parker (106 N. C. 711), 284.
- State v. Parks (3 Iredell (N. C.), L. 296), 17.
- State v. Patterson (2 Iredell (N. C.), 346), 20.
- State v. Patterson (45 Vt. 308), 299.
- State v. Perkins (24 N. J. L. 409), 428.
- State v. Phelps (11 Vt. 116), 114.
- State v. Plym (Minn., 45 N. W. Rep. 848), 259.
- State v. Potter (18 Conn. 166), 115.
- State v. Quails (8 Eng. 307), 44.
- State v. Rhodes (111 N. C. 647), 501.
- State v. Robinson (35 S. C. 340), 000.
- State v. Rose (47 Minn. 47), 23.
- State v. Russell (Mont., 32 Pac. Rep. 854), 298.
- State v. Schaffer (Kan., 24 Pac. Rep. 92), 231.
- State v. Schneider (35 Mo. 533), 348.
- State v. Schweitzer (57 Conn. 532), 231.
- State v. Senn (32 S. C. 392), 89, 93.
- State v. Shaffer (Oreg., 32 Pac. Rep. 545), 298.
- State v. Sherman (42 Mo. 210), 91.

The references are to pages.

- State v. Smith (17 R. I. 415), 266.
 State v. Steveson (78 Iowa, 653), 71.
 State v. Summers (36 S. C. 479), 382.
 State v. Tall (Minn., 45 N. W. Rep. 449), 51.
 State v. Talmage (107 Mo. 543), 448.
 State v. Taylor (44 La. Ann. 783), 23.
 State v. Thaden (Minn., 45 N. W. Rep. 447), 348.
 State v. Thiban (30 Vt. 100), 21.
 State v. Thomas (30 La. Ann. 600), 346.
 State v. Thomas (41 La. Ann. 1088), 397.
 State v. Thomas (99 Mo. 235), 10.
 State v. Thomas (8 Strobhart, 269), 18.
 State v. Thompson (19 Iowa, 399), 508.
 State v. Thompson (79 Iowa, 703), 131.
 State v. Umble (22 S. W. Rep. 378), 298.
 State v. Walsh (44 La. Ann. 1122), 504.
 State v. Watson (82 Iowa, 380), 376.
 State v. Welch (36 W. Va. 690), 404.
 State v. Welsor (Mo., 21 S. W. Rep. 443), 298.
 State v. Whitfield (109 U. S. 876), 116.
 State v. Whitson (111 N. C. 659), 505.
 State v. Whittier (21 Me. 341), 69.
 State v. Williams (35 S. C. 160), 439.
 State v. Williams (5 Wis. 308), 96.
 State v. Wilson (111 N. C. 424), 109.
 State v. Workman (39 S. C. 79), 505.
 State v. Xirschner (23 Mo. App. 349), 73.
 State Bank v. McNeil, 1 Hawks (N. C.), 36), 117.
 State, Bradford v. Malo (42 Kan. 54), 497.
 State, Crawford County v. Coopock (79 Iowa, 482), 69, 318.
 State, Croy v. Gregory (132 Ind. 387), 43.
 State, Glazer v. Mason (24 Mo. App. 321), 379.
 State, Kohn v. Woodward (123 Ind. 30), 487.
 State, Leonard v. Sweet (27 La. Ann. 541), 268.
 State, Schumacher v. Gamelspacher (126 Ind. 398), 98.
 State, Thayer v. Boyd (31 Neb. 682), 306.
 State, Van Armings v. Taylor (108 N. C. 196), 318.
 Stavers v. Rogers (3 Wash. 603), 188.
 Stead v. Heaton (4 T. R. 669), 503.
 Stead v. Worcester (150 Mass. 241), 408.
 Steam Nav. Co. v. Weed (17 Barb. 378), 244.
 Steamer Niagara v. Cordes (21 How. (U. S.) 7), 422.
 Stearns v. Stearns (32 Vt. 678), 420.
 Steed v. Knowles (Ala., 12 S. Rep. 75), 459.
 Steeds v. Steeds (L. R. 22 Q. B. D. 527), 460.
 Steel v. Prickett (2 Stark. 466), 279.
 Steerla v. Kaiser (La. Ann., 12 S. Rep. 839), 152.
 Steffins v. Steffins (33 N. Y. State Rep. 643), 74, 435.
 Stein v. Bienville Water Supply Co. (14 U. S. 67), 241.
 Stein v. Bowman (13 Pet. 209), 76, 127.
 Stein v. Swensen (44 Minn. 218), 458.
 Stein v. Swenson (46 Minn. 360), 164.
 Stephenson v. Felton (106 N. C. 114), 262.
 Stephenson v. Richards (45 Mo. App. 544), 452.
 Stepp v. Nat. Life & M. Ass'n (37 S. C. 417), 394.
 Stern v. State (53 Ga. 229), 416.
 Stevens v. Beach (2 Vern. 585), 20.
 Stevens v. Carson (30 Neb. 544), 419.
 Stevens v. Flanagan (131 Ind. 122), 192.
 Stevens v. Newcomb (4 Denio, 437), 268.
 Steyens v. Rogers (25 Hun, 54), 370.
 Stevens v. Stevens (54 Hun, 490), 74.
 Stevens v. Stevens (150 Mass. 557), 392.
 Stevens v. Vroman (16 N. Y. 381), 276.

The references are to pages.

- | | |
|--|--|
| <p>Stevenson v. Gunning (64 Vt. 601), 225.</p> <p>Stewart v. Cincinnati, W. & M. R. Co. (89 Mich. 315), 139.</p> <p>Stewart v. Everts (76 Wis. 35), 343.</p> <p>Stewart v. Porter Mfg. Co. (13 N. Y. State Rep. 221), 8, 14.</p> <p>Stewart v. Severance (43 Mo. 322), 344.</p> <p>Stiles v. Danville (42 Vt. 282), 342.</p> <p>Stillings v. Trimmings (152 Mass. 147), 146.</p> <p>Stillman v. Hurd (10 Tex. 107), 171.</p> <p>Stillman v. Northrup (109 N. Y. 473), 232.</p> <p>Stillman v. Palis (23 Ill. App. 408), 122.</p> <p>Stillwater v. Farewell (64 Vt. 286), 305.</p> <p>Stillwell v. Patton (108 Mo. 352), 456.</p> <p>Stillwell v. St. Louis & H. R. Co. (39 Mo. App. 221), 154.</p> <p>Stinchfield v. Emerson (52 Me. 465), 443.</p> <p>Stinchfield v. Milliken (71 Me. 567), 190.</p> <p>St. John v. Missouri P. R. Co. (101 Mo. 417), 344.</p> <p>St. John's Church v. Steinmitz (18 Pa. St. 273), 245.</p> <p>St. Louis, A. & T. R. Co. v. Johnston (78 Tex. 536), 383.</p> <p>St. Louis, A. & T. R. Co. v. Jones (Tex., 14 S. W. Rep. 309), 315.</p> <p>St. Louis F. Nat. Bank v. Nichols (43 Mo. App. 385), 108.</p> <p>St. Louis Gas Light Co. v. Am. F. Ins. Co. (33 Mo. App. 348), 408.</p> <p>St. Louis, I. M. & S. R. Co. v. Lyman (57 Ark. 103), 361.</p> <p>Stockton Sav. & L. Ass'n v. Giddings (96 Cal. 84), 152.</p> <p>Stockwell v. Dillingham (50 Me. 442), 272.</p> <p>Stockwell v. United States (13 Wall. 531), 273.</p> <p>Stoddard v. Mix (14 Conn. 12), 136.</p> | <p>Stoddard v. Whitney (46 N. Y. 627), 147.</p> <p>Stokes v. Macken (62 Barb. 145, 149), 91, 99, 455.</p> <p>Stone v. Frost (61 N. Y. 614), 239.</p> <p>Stone v. Hubbard (61 Mass. 595), 403.</p> <p>Stone v. More (83 Iowa, 186), 394.</p> <p>Stone v. Paland (58 Hun, 21), 329.</p> <p>Stoneman v. Erie R. Co. (52 N. Y. 429), 262.</p> <p>Stoops v. Smith (100 Mass. 63), 148.</p> <p>Storring v. Barren (6 Barb. 109), 293.</p> <p>Storrs v. Storrs (3 Fla. 274), 419.</p> <p>Story v. Bishop (4 E. D. Smith, 423), 239.</p> <p>Story v. Lovett (1 E. D. Smith, 153), 121.</p> <p>Stott v. N. Y., L. E. & W. R. Co. (50 N. Y. State Rep. 500), 141.</p> <p>Stout v. Russell (2 Yates, 334), 49.</p> <p>Stouter v. Manhattan R. Co. (127 N. Y. 661), 396.</p> <p>Stouvenel v. Stephens (2 Daly, 323), 445.</p> <p>Stouvenel v. Stephens (26 How. Pr. (N. Y.) 244), 288.</p> <p>Stovall v. Bank (10 Wall. 83), 110.</p> <p>Stover v. Taber (83 Me. 387), 129.</p> <p>Stowe v. Querner (L. R. 5 Exch. 155), 129.</p> <p>Stoyell v. Stoyell (82 Me. 332), 188.</p> <p>Strand v. Tilton (4 Abb. Ct. App. Dec. 324), 305.</p> <p>Stratton v. Lockhart (1 Ind. App. 380), 391.</p> <p>Strawl v. Lawrence (33 Ala. 106), 95.</p> <p>Stringfellow v. State (26 Miss. 157), 127.</p> <p>Strohm v. N. Y., L. E. & W. R. Co. (96 N. Y. 305), 369.</p> <p>Strough v. Wilder (49 Hun, 405), 249.</p> <p>Strough v. Wilder (119 N. Y. 530), 85.</p> <p>Stuart v. Binsse (7 Bosw. 195), 309.</p> <p>Stuart v. Kissam (11 Barb. 282), 250.</p> <p>Stull v. Thompson (154 Pa. St. 43), 180.</p> <p>Sturgis v. Hendricks (51 N. Y. 635), 487.</p> |
|--|--|

The references are to pages.

- Sturgis v. Wiltsie (19 N. Y. Week. Dig. 266), 379.
- Sturgis v. Work (122 Ind. 134), 154, 255.
- Styles v. Buller (101 N. Y. 622), 42.
- Sublet v. Hodges (88 Ala. 491), 79.
- Sudlow v. Warsling (108 N. Y. 520), 404.
- Sugarman v. Manhattan El. R. Co. (42 N. Y. State Rep. 30), 428.
- Suidam v. N. Y. El. R. Co. (38 N. Y. State Rep. 671), 479.
- Sullivan v. Lear (23 Fla. 463), 477.
- Sullivan v. McMillan (26 Fla. 443), 118.
- Summerlot v. Hamilton (121 Ind. 87), 273.
- Sunday v. Thomas (26 Ga. 537), 131.
- Sutherland v. Ross (140 Pa. St. 379), 79.
- Sutherland v. Standard L. & Acc. Ins. Co. (Iowa, 54 N. W. Rep. 453), 309.
- Sutton v. People (145 Ill. 279), 232.
- Sutton v. Reagan (5 Blackf. 216), 21.
- Swales v. Grubbs (126 Ind. 106), 93.
- Swales v. White (149 Pa. St. 261), 386.
- Swain v. Seamen (76 U. S. 272), 191.
- Sweet v. Wright (57 Iowa, 510), 323.
- Sweetser v. Drove (19 Ala. 255), 122.
- Swenck v. People (20 Ill. App. 111), 51.
- Swinerton v. Columbia Ins. Co. (37 N. Y. 174), 91.
- Sydeleman v. Beckwith (43 Conn. 9), 359.
- Sylvester v. Crapo (15 Pick. 92), 111.
- Symmes v. Maor (21 Ind. 443), 97.
- T.**
- Tabor v. Judd (62 N. H. 288), 460.
- Taggart v. New York Street R. Co. (41 Alb. L. J. 615; 19 Atl. Rep. 326), 94.
- Talbot v. Hodson (7 Taunt. 251), 122.
- Tarbox v. Eastern Steamship Co. (50 Me. 339), 422.
- Tasker v. Stanley (153 Mass. 148), 391.
- Tatham v. Wright (2 Russ. & Mylne, 1, 19), 360.
- Tatum v. Calamen (16 Q. B. 745), 457.
- Taylor v. Arnold (13 Ky. L. Rep. 516), 340.
- Taylor v. Baltimore & O. R. Co. (33 W. Va. 39), 362.
- Taylor v. Barclay (2 Sim. 213), 90.
- Taylor v. Bradley (39 N. Y. 144), 365.
- Taylor v. Cole (7 T. R. 3), 288.
- Taylor v. Davis (82 Wis. 455), 188, 304.
- Taylor v. Dominick (36 S. C. 363), 22.
- Taylor v. Dugger (66 Ala. 444), 451.
- Taylor v. Guest (58 N. Y. 262), 31.
- Taylor v. Moore (63 Vt. 60), 160.
- Taylor v. Peck (21 Gratt. 11, 20), 120.
- Taylor v. Pinquite (35 Mo. App. 389), 362.
- Taylor v. Riggs (1 Pet. 591), 129.
- Taylor v. Sayer (24 N. J. L. 47), 39.
- Taylor v. Smith (16 Ga. 7), 18.
- Taylor v. State (83 Ga. 647), 313.
- Teal v. Consolidated Electric Light Co. (119 N. Y. 654), 230.
- Tell v. Beyer (38 N. Y. 161), 25.
- Temple v. Hager (27 Cal. 163), 99.
- Tenney v. Abraham (43 La. Ann. 240), 160.
- Terpening v. Skinner (30 Barb. 373), 253.
- Terre Haute, etc. R. Co. v. Clems (123 Ind. 15), 428.
- Territory v. Duren (3 N. M. 134), 70.
- Territory v. Godfrey (6 Dak. 46), 342.
- Territory v. Roberts (9 Mont. 12), 386.
- Territory v. Yee Shun (3 N. M. 82), 68.
- Terry v. N. C. R. Co. (22 Barb. 574), 422.
- Texas v. Chiles (21 Wall. 488), 67.
- Texas C. R. Co. v. Burnett (80 Tex. 536), 396.
- Texas M. Pres. Co. v. Locke (74 Tex. 370), 270.

The references are to pages.

- Texas & N. O. R. Co. v. Crowder (76 Tex. 499), 423.
- Texas & P. R. Co. v. Barron (78 Tex. 421), 342.
- Texas & P. R. Co. v. Brick (83 Tex. 598), 221.
- Texas & P. R. Co. v. Lester (75 Tex. 56), 329.
- Texas Standard Cotton Oil Co. v. Adoue (83 Tex. 650), 99, 342.
- Thayer v. Barney (12 Minn. 513), 434.
- Thayer v. Boyd (31 Neb. 682), 88, 120.
- Thayer v. Daniels (113 Mass. 129), 240.
- The American Eagle (54 Fed. Rep. 1010), 231.
- The Britannia (43 Fed. Rep. 96), 424.
- The Charles Hebard (46 Fed. Rep. 136), 424.
- The Chas. L. Jeffrey (55 Fed. Rep. 1015), 221.
- The Confederate Note Case (19 Wall. 548), 148.
- The Duchess of Kingston's Case (20 St. Tri. 572), 424.
- The Frank & Willis (45 Fed. Rep. 96), 424.
- The J. D. Peters (42 Fed. Rep. 269), 424.
- The Lamson Con. S. S. Co. v. Harting (46 N. Y. State Rep. 191), 175.
- The Mascot (51 Fed. Rep. 605), 21, 26.
- The Normandia (43 Fed. Rep. 137), 424.
- The St. John (54 Fed. Rep. 1015), 221.
- The Ville De Havre (7 Bin. 328), 487.
- The Wyonia (55 Fed. Rep. 338), 221.
- Theisen v. Dayton (82 Iowa, 74), 53.
- Thomas v. Beal (48 Fed. Rep. 618), 308.
- Thomas v. Caulkett (57 Mich. 392), 477.
- Thomas v. Citizens' Pass. R. Co. (132 Pa. St. 504), 479.
- Thomas v. Gage (57 N. Y. State Rep. 591), 108.
- Thomas v. Philadelphia & R. P. Co. (148 Pa. St. 180), 423.
- Thomas v. Scott (127 N. Y. 133), 184.
- Thomas v. Steinheimer (29 Md. 268), 109.
- Thomas v. Stiggers (2 Ill. 73), 95.
- Thomas v. Truscott (53 Barb. 200), 209.
- Thompson v. Dickhart (66 Barb. 604), 370.
- Thompson v. Hagdon (12 Ad. & El. 135), 133.
- Thompson v. Ish (99 Mo. 160), 59, 277.
- Thompson v. Riggs (5 Wall. 663), 144.
- Thompson v. Roberts (24 How. (U. S.) 233), 508.
- Thompson v. Rowman (6 Wall. 316), 273.
- Thompson v. Smith (96 Mich. 258), 153.
- Thompson v. Southern Cal. M. R. Co. (82 Cal. 497), 155.
- Thompson v. Thompson (Ind., 31 N. E. Rep. 528), 265.
- Thompson v. Poor (57 Hun, 285), 190.
- Thorington v. Smith (9 Wall. 1), 148.
- Thorman v. Palya (48 N. Y. State Rep. 671), 181.
- Tibballs v. Jacob (31 Conn. 428), 451.
- Tibbetts v. Percy (24 Barb. 39), 195.
- Tiffany v. Driggs (13 Johns. 253), 216.
- Tilbury v. Silva (C. A., 45 Ch. D. 98), 459.
- Tilman v. Coosaw Min. Co. (54 Fed. Rep. 804), 88.
- Tilton v. Clinton Ins. Co. (7 Barb. 568), 457.
- Tilson v. Terwilliger (56 N. Y. 273), 336.
- Tilton v. Emery (17 N. H. 536), 104.
- Timlin v. Standard Oil Co. (126 N. Y. 514), 230.
- Tioga R. Co. v. Blossbury & C. R. Co. (20 Wall. 137), 507.
- Tisdale v. Connecticut Mut. L. Ins. Co. (26 Iowa, 170), 445.
- Tisdale v. Delaware & H. C. R. Co. (116 N. Y. 416), 367.
- Titterington v. Trees (78 Tex. 567), 275.
- Tittle v. State (30 Tex. App. 597), 138.

The references are to pages.

- Tobin v. Fairport (12 N. Y. Supp. 224), 342.
- Tocci v. Arata (35 N. Y. State Rep. 42), 174.
- Toledo Elect. Str. R. Co. v. Toledo Co. Str. R. Co. (26 Ohio L. J. 172), 343.
- Tolmie v. Thompson (3 Cranch, 126), 421.
- Tombler v. Reitz (Ind., 33 N. E. Rep. 789), 152.
- Tome v. Gerlock (64 Hun, 635), 432.
- Tomlinson v. Borst (30 N. Y. 42), 305.
- Toole v. State (88 Ala. 158), 429.
- Tooley v. Bolon (70 N. Y. 37), 249.
- Topeka v. Martineau (42 Kan. 387), 139.
- Toplitz v. Hedden (146 U. S. 252), 96.
- Totten v. Read (32 N. Y. State Rep. 46), 276.
- Totten v. United States (92 U. S. 105), 60.
- Tousley v. Barrey (16 N. Y. 497), 111.
- Tourtellotte v. Brown (1 Colo. App. 408), 432.
- Towle v. Blake (48 N. H. 92), 330.
- Town of Cherokee v. S. C. & Y. F. Town L. & L. Co. (52 Iowa, 279), 483.
- Towner v. Thompson (81 Ga. 171), 335.
- Townsend v. Briggs (Cal., 32 Pac. Rep. 309), 137.
- Townsend v. Fontenot (42 La. Ann. 890), 206.
- Tozer v. N. Y. C. & H. R. R. Co. (38 Hun, 100), 365.
- Transportation Line v. Hoge (95 U. S. 291), 358.
- Travers v. Shaeffe (33 Neb. 531), 8.
- Travers v. Snyder (38 Ill. App. 379), 350.
- Traveler's Ins. Co. v. Murray (16 Colo. 296), 230.
- Traveler's Ins. Co. v. Sheppard (85 Ga. 751), 405.
- Treadwell v. Whittier (80 Cal. 574), 424.
- Treanor v. Manhattan R. Co. (41 N. Y. State Rep. 614), 58.
- Treat v. Treat (35 Conn. 210), 451.
- Trelawney v. Coleman (1 B. & Ald. 90), 348.
- Trelawney v. Coleman (2 Stark. 191), 348.
- Trevis v. Hicks (41 Cal. 123), 345.
- Triess v. Rider (24 N. Y. 367), 192.
- Trimble v. Stillwell (4 E. D. Smith, 512), 34.
- Trimbo v. Trimbo (47 Minn. 389), 441.
- Trisne Canal Co. v. Dunbar (80 Cal. 530), 309.
- Troy Fertilizer Co. v. Logan (90 Ala. 325), 62, 387.
- Trual v. Slater (86 N. Y. 630), 337.
- Truman v. Bishop (83 Iowa, 697), 190.
- Truscott v. King (6 N. Y. 147), 200.
- Truesdale Mfg. Co. v. Hoyle (39 Ill. App. 532), 373.
- Trustees, etc. v. O'Mailey (18 Ill. 407), 505.
- Tryon v. White, etc. Co. (62 Conn. 161), 327.
- Tucker v. Kellogg (8 Utah, 11), 404.
- Tucker v. Mass. C. R. Co. (118 Mass. 347), 360.
- Tucker v. Wilkins (105 N. C. 272), 277.
- Tumlin v. Goldsmith (40 Ga. 221), 103.
- Tunstall v. Parish of Madison (3 La. Ann. 471), 417.
- Turnbull v. Payson (95 U. S. 418), 123.
- Turner v. Boston & M. R. Co. (158 Mass. 261), 141, 487.
- Turner v. Brown (6 Hun, 331), 262.
- Turner v. City of Newburg (109 N. Y. 301), 375.
- Turner v. Green (2 Cranch, Cir. Ct. 202), 121.
- Turner v. Patton (48 Ala. 406), 96.
- Turner v. State (89 Tenn. 547), 298.
- Turner v. State (5 Ohio C. C. 538), 387.

The references are to pages.

- | | |
|--|--|
| Turner v. Yates (16 How. (U. S.) 14), 112. | United States v. Cross (D. C., 20 Wash. L. Rep. 98), 290. |
| Turney v. Evans (14 N. H. 343), 103. | United States v. Cumphries (1 Cranch C. C. 74), 114. |
| Turnier v. Lathers (59 Hun, 623), 422. | United States v. Dashiell (3 Wall. 688), 236. |
| Tuscaloosa v. Wright (11 Ala. 230), 317. | United States v. Douglass (2 Blatchf. 207), 114. |
| Tuscaloosa First Nat. Bank v. Kennedy (91 Ala. 470), 419. | United States v. Dunn (6 Pet. 51), 143. |
| Tuttle v. Russell (2 Day, 201), 17. | United States v. Heath (19 Wash. L. Rep. 818), 299. |
| T. W. Harvey Lumber Co. v. Herri-
man, etc. Lumber Co. (39 Mo.
App. 214), 187. | United States v. Hollis (43 Fed. Rep. 248), 73. |
| Tyler v. Hall (106 Mass. 313), 54. | United States v. Jackson (104 U. S. 41), 98. |
| Tyler v. O'Reilly (59 Hun, 618), 164. | United States v. King (20 Wash. L. Rep. 507), 407. |
| Tyler v. Tyler (126 Ill. 525), 53. | United States v. Knott (1 McLean, 499), 115. |
| Tyler v. Waddington (58 Conn. 375), 187. | United States v. Kurtz (4 Cranch C. C. 166), 115. |
| Tyres v. Kennedy (126 Ind. 533), 340. | United States v. Newton (52 Fed. Rep. 275), 350. |
| U. | United States v. Paglians (54 Fed. Rep. 1001), 141. |
| Ufford v. Spaulding (156 Mass. 65), 455. | United States v. Palmer (3 Wheat. 610), 90. |
| Unanast v. Goodyear India Rubber
Glove Co. (141 Pa. St. 127), 354. | United States v. Rodman (15 Pet. 130), 127. |
| Union Mut. Ins. Co. v. Wilkinson (13
Wall. 222), 143. | United States v. Saunders (1 Humph. (Tenn.) 483), 286. |
| Union P. R. Co. v. Marston (30 Neb. 241), 426. | United States v. Schneider (21 Wash. L. Rep. 45), 297. |
| Union Sav. Co. v. Edwards (47 Mo. 445), 110. | United States v. Smith (5 Utah, 273), 260. |
| United States v. Arredondo (6 Pet. 715), 173. | United States v. Stevens (4 Cranch C. C. 341), 22. |
| United States v. Alexander (46 Fed. Rep. 728), 266. | United States v. Teschmaker (22 How. (U. S.) 392), 102. |
| United States v. Babcock (3 Dill. (U. S.) 576), 136. | United States v. Turner (11 How. (U. S.) 663), 362. |
| United States v. Baxter (46 Fed. Rep. 350), 477. | United States v. Wallamet V. & C. M. Co. (42 Fed. Rep. 351), 98. |
| United States v. Burns (5 McLean, 23), 90. | United States v. Wiggins (14 Pet. 334), 123. |
| United States v. Carr (132 U. S. 644), 498. | United States Bank v. Stearns (15 Wend. 304), 311. |
| United States v. Chong Sam (47 Fed. Rep. 818), 258. | |
| United States v. Craig (4 Wash. C. C. 229), 444. | |

The references are to pages.

- United States Life Ins. Co. v. Kielgast (26 Ill. App. 567), 217.
- Updyke v. Wheeler (37 Mo. App. 680), 329.
- Upton v. Starbridge Cotton Mills (111 Mass. 446), 168.
- Uransky v. Dry Dock E. B. R. Co. (59 Hun, 626), 376.
- V.**
- Vail v. Rice (5 N. Y. 155), 167.
- Valkenaud v. Drum (154 Pa. St. 616), 208.
- Valkmar v. Manhattan R. Co. (53 Hun, 506), 428.
- Van Buskirk v. Roberts (31 N. Y. 661), 196.
- Vanderberg v. Boston & A. R. Co. (21 N. Y. Week. Dig. 474), 365.
- Vanderpool v. Blake (28 Ind. 136), 416.
- Vanderlin v. Hovis (152 Pa. St. 11), 155.
- Van Doren v. Liebman (34 N. Y. State Rep. 752), 458.
- Van Gent v. Chicago, M. & St. P. R. Co. (Iowa, 45 N. W. Rep. 913), 164.
- Van Giesen v. Van Giesen (10 N. Y. 316), 235.
- Van Horn v. Van Horn (49 N. J. Eq. 327), 208.
- Van Horn v. Nostrand (24 Barb. 25), 21.
- Van Orman v. Van Orman (58 Hun, 606; 34 N. Y. State Rep. 824), 57.
- Van Rensselaer v. Gallup (5 Denio, 454), 32.
- Van Rensselaer v. Mould (48 Hun, 396), 477.
- Van Rensselaer v. Shafer (121 N. Y. 712), 452.
- Van Rensselaer v. Wright (121 N. Y. 626), 452.
- Van Slyke v. Chicago, St. P. & K. C. R. Co. (Iowa, 45 N. W. Rep. 396), 436.
- Van Vleet v. Sledge (45 Fed. Rep. 743), 149.
- Van Winkle v. Crowell (146 U. S. 42), 186.
- Van Wycklin v. Brooklyn (118 N. Y. 424; 41 Alb. L. J. 178; 29 N. Y. State Rep. 790), 364.
- Van Wycklyn v. City of Rochester (118 N. Y. 427), 309.
- Varnum v. Hart (47 Hun, 18), 387.
- Vasburg v. Lake Shore & M. S. R. Co. (14 N. Y. Week. Dig. 514), 120.
- Vater v. Lewis (36 Ind. 288), 244.
- Vatton v. National, etc. Assur. Soc. (22 Barb. 9), 21.
- Vaughn v. Perine (2 Pennington, 628), 449.
- Vejar v. Mound City L. & W. (Cal., 32 Pac. Rep. 713), 199.
- Vernon v. Valk (2 Hill, Ch. 257), 250.
- Viall v. Leavens (39 Hun, 291), 85, 137.
- Viall v. Smith (6 R. L. 419), 289.
- Vilmar v. Schall (35 N. Y. Sup. Ct. 67), 306.
- Vilmar v. Schall (61 N. Y. 564), 37.
- Vinson v. Chicago, St. P., M. & O. R. Co. (47 Minn. 265), 425.
- Vinton v. Peck (14 Mich. 287), 403.
- Voisin v. Commercial Mut. Ins. Co. (67 Hun, 365), 309.
- Voorhees v. Dorr (51 Barb. 580), 131.
- Vosburg v. Thayer (12 Johns. 461), 304.
- Vowles v. Young (13 Ves. 148), 289.
- Vrooman v. King (36 N. Y. 477), 334.
- W.**
- Wabash W. R. Co. v. Morgan (Ind., 31 N. E. Rep. 661), 408.
- Waechtershauser v. Smith (31 N. Y. State Rep. 552), 158.
- Wadd v. Hazleton (62 Hun, 602), 53.
- Waddill v. Sebree (88 Va. 1012), 194.
- Wadsworth v. Heemans (85 N. Y. 639), 84.
- Wagner's Appeal (43 Pa. St. 102), 255.
- Wagner v. Winter (122 Ind. 57), 10.

The references are to pages.

- Waite v. Coaracy (45 Minn. 159), 442.
 Waiting v. Toll (9 Johns. 141), 30.
 Wakefield v. Ross (5 Mason, 16), 68.
 Wakeman v. Sherman (9 N. Y. 85), 217.
 Wakeman v. Wheeler & W. Mfg. Co. (101 N. Y. 205), 366.
 Waldele v. New York C. & H. R. R. Co. (95 N. Y. 274), 325.
 Waldon v. Davison (11 Wend. 65), 133.
 Waldrof v. Greenwood, L. & S. R. Co. (28 S. C. 157), 108.
 Waldron v. Tuttle (4 N. H. 371), 285.
 Walker v. Allen (72 Ala. 456), 95.
 Walker v. Carradine (78 Tex. 489), 460.
 Walker v. Davis (33 Me. 516), 432.
 Walker v. Rogers' Ex'rs (24 Md. 239), 360.
 Walker v. Wingfield (18 Ves. 511), 284.
 Wall v. Delaware, L. & W. R. Co. (54 Hun, 454), 423.
 Wallace v. Central Vt. R. Co. (138 N. Y. 302), 165.
 Wallace v. Cox (71 Ill. 518), 420.
 Wallace v. First Parish (109 Mass. 264), 320.
 Wallace v. Nodine (57 Hun, 239), 393.
 Waller v. Hagerty (Neb., 46 N. W. Rep. 221), 179.
 Waln v. Waln (53 N. J. L. 429), 179.
 Walrod v. Ball (9 Barb. 271), 440.
 Walls v. Bailey (49 N. Y. 464), 156.
 Walls v. State (125 Ind. 400), 351.
 Walsh v. Marine Ins. Co. (32 N. Y. 427), 358.
 Walsh v. Missouri P. R. Co. (102 Mo. 589), 98, 380.
 Walton v. Agricultural Ins. Co. (116 N. Y. 317), 147.
 Ward v. Chicago, St. P. & O. R. Co. (Wis., 55 N. W. Rep. 771), 381.
 Ward v. Dean (56 Hun, 585), 22.
 Ward v. Doane (77 Mich. 328), 441.
 Ward v. Kilpatrick (85 N. Y. 413), 367.
 Ward v. People (3 Hill, 395), 44.
 Ward v. State (48 Ind. 290), 417.
 Ward v. State (30 Tex. App. 687), 467.
 Ward v. Ward (36 Ark. 586), 451.
 Ward v. Ward (59 Conn. 188), 344.
 Warley v. Spurgeon (38 Iowa, 465), 215.
 Warner v. Clark (45 La. Ann. 897), 13.
 Warner v. Henby (47 Pa. St. 187), 459.
 Warner v. Letzinger (45 Mo. App. 106), 436.
 Warner v. Lucas (10 Ohio St. 336), 44.
 Warner v. Press Pub. Co. (132 N. Y. 180), 61.
 Warren v. Fredericks (76 Tex. 647), 352.
 Warren v. Phoenix Ins. Co. (65 Hun, 621), 186.
 Washburn v. Milwaukee & L. W. R. Co. (59 Wis. 364), 483.
 Washburn v. Nat. Acc. Ass'n (56 Hun, 585), 395.
 Washburn v. People (10 Mich. 372), 69.
 Washington v. Hosp (43 Kan. 324), 429.
 Washington v. Scribner (109 Mass. 487), 60.
 Washington & C. A. P. Co. v. Sickler (24 How. (U.S.) 333), 508.
 Washington & G. R. Co. v. Tobener (147 U. S. 571), 221.
 Wasserman v. Willett (10 Abb. Pr. (N. Y.) 63), 263.
 Waterbury v. Dakota F. & M. Ins. Co. (40 Alb. L. J. 513), 230.
 Waterbury v. Westervelt (9 N. Y. 598), 239.
 Waterman v. Chicago & A. R. Co. (82 Wis. 613), 425.
 Waterman v. Shipman (65 Hun, 622; 47 N. Y. State Rep. 418), 9.
 Waters v. Gilbert (2 Cush. 27), 320.
 Waters v. Waters (35 Md. 513), 360.
 Watson v. Minneapolis St. R. Co. (55 N. W. Rep. 742), 381.
 Watson v. Osborn (8 Conn. 363), 117.

The references are to pages.

- Watson v. Pinckney (46 N. Y. State Rep. 245), 419.
 Watson v. Roodie (30 Neb. 264), 120.
 Watson v. Walker (23 N. H. 471), 127.
 Watts v. Warren (108 N. C. 514), 82.
 Wausau Boom Co. v. Dunbar (75 Wis. 133), 164.
 Weaver's Appeal (63 Pa. St. 309), 126.
 Webb v. Lees (149 Pa. St. 13), 452.
 Webb v. Richardson (42 Vt. 462), 341.
 Webber v. Corbett (L. R. 16 Eq. 515), 254.
 Webber v. Hoag (55 Hun, 605), 323.
 Webber v. Kingsland (8 Bosw. 415), 161.
 Webber Wagon Co. v. Kehl (139 Ill. 644), 383.
 Webster v. Atkinson (4 N. H. 21), 160.
 Webster v. Le Compté (74 Md. 249), 391.
 Weed v. Kellogg (6 McLean, 44), 112.
 Weed v. London & L. Fire Ins. Co. (116 N. Y. 106), 155, 254.
 Weed v. Panama R. Co. (17 N. Y. 362), 245.
 Weeks v. Lyon (18 Barb. 530), 47.
 Weeks v. Sparke (1 M. & S. 690), 277.
 Wegener v. Butler (57 N. Y. State Rep. 479), 186.
 Weigand v. Sichel (4 Abb. Ct. App. Dec. 592), 38.
 Weinberg v. Kran (44 N. Y. State Rep. 126), 7.
 Weinstein v. Reid (25 Mo. App. 41), 51.
 Weis v. Edgerton School Board (Wis., 41 Alb. L. J. 452), 93.
 Welch v. Old Dominion Min. & R. Co. (56 Hun, 650), 241.
 Welch v. Tribune Pub. Co. (82 Mich. 661), 12.
 Welcome v. Batchelor (33 Me. 85), 49.
 Weld v. Brooks (152 Mass. 297), 282.
 Welland Canal Co. v. Hathaway (8 Wend. 480), 243.
 Wellman v. Chicago & S. R. Co. (83 Mich. 592), 95.
 Wells v. Eastman (61 N. H. 507), 382.
 Wells v. Jackson, etc. Co. (47 N. H. 235), 92.
 Wells v. Missouri P. R. Co. (Mo., 19 S. W. Rep. 530), 89.
 Welsh v. Argyle (Wis., 55 N. W. Rep. 412), 221.
 Welsh v. Barrett (15 Mass. 380), 308.
 Wentworth v. Wentworth (71 Mo. 83), 443.
 Werely v. Persons (28 N. Y. 345), 332.
 Wescott v. Keeler (4 Bosw. 564), 237.
 West v. Davis (7 East, 362), 121.
 West v. Van Tuyl (119 N. Y. 620), 305.
 Westbrook v. Howell (34 Ill. App. 571), 146.
 Western Assur. Co. v. The Sarah J. Weed (40 Fed. Rep. 844), 424.
 Western A. R. Co. v. Vandiver (Ga., 11 S. E. Rep. 781), 423.
 Western Nat. Bank v. Wood (46 N. Y. State Rep. 649), 190.
 Western U. T. Co. v. Adams (75 Tex. 531), 392.
 Western U. T. Co. v. Lydon (82 Tex. 364), 327.
 Western Wood Com. Co. v. Hart (Tex., 20 S. W. Rep. 131), 316.
 Westervelt v. Ackley (62 N. Y. 505), 39.
 Westfield v. Warren (8 N. J. L. 289), 286.
 Whalin v. White (25 N. Y. 462), 510.
 Wheeler v. Alderson (3 Hagg. Ecc. R. 574), 360.
 Wheeler v. Hambright (9 Serg. & Rawle, 396), 112.
 Wheeler v. Newbold (5 Duer, 29), 169.
 Wheeler v. Oceanic Steam Nav. Co. (125 N. Y. 155), 427.
 Wheeler v. Ruckman (51 N. Y. 391), 508.
 Wheeler v. Smith (18 Wis. 651), 307.
 Wheeler v. Walker (45 N. H. 355), 317.
 Wheelwright v. Walsh (42 Fed. Rep. 862), 230.

The references are to pages.

- Whilden v. Merchants' Bank (64 Ala. 1), 136.
- Whitaker v. Marsh (62 N. H. 477), 313.
- Whitaker v. Salisbury (15 Pick. 534), 19, 122.
- Whitaker v. Eighth Ave. R. Co. (51 N. Y. 295), 326.
- White v. Benjamin (23 N. Y. Supr. Ct. 981), 222.
- White v. Chouteau (10 Barb. 202), 300.
- White v. Classby (104 Mo. 162), 419.
- White v. Davis (62 Hun, 622), 374.
- White v. Hutchings (40 Ala. 253), 293.
- White v. Johnson (4 Wash. 113), 435.
- White v. Joy (13 N. Y. 83), 38.
- White v. Long (24 Pick. 319), 296.
- White v. Madison (26 N. Y. 117), 508.
- White v. Mann (26 Me. 363), 445.
- White v. Rankin (90 Ala. 341), 97.
- White v. Richmond & D. R. Co. (110 N. C. 456), 180.
- White v. State (86 Ala. 69), 53.
- White v. State (70 Miss. 253), 502.
- White v. State (30 Tex. App. 652), 298.
- White v. Talmage (35 N. Y. Supr. Ct. 223), 30.
- White v. Van Kirk (25 Barb. 16), 191.
- White v. White (82 Cal. 427), 22, 436.
- White's Bank v. Myles (73 N. Y. 335), 178.
- Whitehouse v. Beckford (9 Foster, 471), 124.
- Whitlock v. Baker (13 Ves. 514), 280.
- Whitely v. Clark (29 Ill. App. 36), 230.
- Whitesel v. Hiney (62 Ind. 168), 228.
- Whiteside v. United States (93 U. S. 247), 267.
- Whiting v. Barney (30 N. Y. 330), 50.
- Whiting v. Nichol (46 Ill. 230), 259.
- Whitman v. Foley (125 N. Y. 657), 80.
- Whitmarsh v. George (8 B. & C. 556), 110.
- Whitmore v. Biscoff (5 Hun, 126), 370.
- Whitmore v. Peck (19 Alb. L. J. 400), 39.
- Whitney v. Ferris (10 Johns. 66), 104.
- Whitney v. Mississippi V. Mut. Ins. Co. (76 Wis. 592), 477, 503.
- Whitney v. Short (149 Pa. St. 29), 411.
- Whitney v. Thacher (117 Mass. 523), 481.
- Whitney & Holmes Organ Co. v. Pettitt (34 Mo. App. 536), 387.
- Whiton v. Snyder (88 N. Y. 299), 374.
- Whittier v. Vose (16 Me. 403), 105.
- Whitton v. State (37 Miss. 379), 206.
- Whyte v. Whyte (7 Moak's Eng. Rep. 672), 357.
- Wichita U. of R. C. in U. S. v. Schweister (50 Kan. 672), 199.
- Wickham v. Terhume (54 Ill. 639), 230.
- Wicks v. State (28 Tex. App. 448), 348.
- Wickwire v. State (19 Conn. 477), 215.
- Wiedekind v. Tuolumne County W. Co. (83 Cal. 198), 378.
- Wilber v. Stoepel (82 Mich. 344), 160.
- Wilcox v. Corwin (117 N. Y. 500), 77, 248.
- Wilcox v. Smith (5 Wend. 231), 267.
- Wilcox v. Wilcox (48 Barb. 327), 430.
- Wiley v. Athol (150 Mass. 426), 316.
- Wiley v. Calf & Co. (Cal., 32 Pac. Rep. 522), 145.
- Wilkins v. State (Ala., 13 S. Rep. 312), 505.
- Wilkins v. Stedger (22 Cal. 231), 112.
- Wilkins v. Tourtellott (42 Kan. 176), 429.
- Will M. Kennard Co. v. Cutler Power Co. (Mass., 34 N. E. Rep. 460), 186.
- Willard v. Pinard (Vt., 26 Atl. Rep. 67), 235.
- Williams v. Bridges (2 Stark. 42), 111.
- Williams v. Cheney (3 Gray, 220), 242.
- Williams v. Clark (47 Minn. 53), 406.
- Williams v. Dickinson (28 Fla. 90), 350.
- Williams v. Gillies (75 N. Y. 197), 147.

The references are to pages.

- Williams v. Hutchinson (3 N. Y. 312), 429.
 Williams v. Mocatie (Va., 10 S. E. Rep. 1061), 194.
 Williams v. Mower (35 S. C. 206), 82.
 Williams v. People (121 Ill. 84), 231.
 Williams v. People (24 N. Y. 407), 88.
 Williams v. Spencer (150 Mass. 346), 38, 39.
 Williams v. State (Ark., 16 S. W. Rep. 816), 106.
 Williams v. Tilt (36 N. Y. 319), 31.
 Williams v. Wager (64 Vt. 326), 309.
 Williams v. Williams (82 Mich. 449), 478.
 Willis v. Byars (Tex., 21 S. W. Rep. 320), 145.
 Willis v. Rector (50 Fed. Rep. 684), 270.
 Wills v. Higgins (132 N. Y. 459), 10.
 Wills v. Leverich (20 Oreg. 168), 160.
 Wilson v. Beauchamp (50 Miss. 24), 251.
 Wilson v. Betts (4 Denio, 201), 293.
 Wilson v. California C. R. Co. (94 Cal. 166), 426.
 Wilson v. Clark (1 Ind. App. 182), 390.
 Wilson v. Coleman (81 Ga. 297), 355.
 Wilson v. Dan (74 N. Y. 531), 145.
 Wilson v. Glenn (68 Ala. 383), 459.
 Wilson v. Hotchkiss (81 Mich. 172), 457.
 Wilson v. Simpson (80 Tex. 279), 340.
 Wilson v. Spring (64 Ill. 18), 112.
 Wilson v. State (30 Fla. 234), 504.
 Wilson v. State (54 Ind. 553), 93.
 Wilson v. Town (57 Hun, 589), 8, 14.
 Wilson v. Troup (7 Johns. Ch. 25), 52.
 Wilson v. Webster (7 C. & P. 198), 390.
 Wilts v. Dinsiman (7 How. (U. S.) 130), 276.
 Wimple v. McMannus (39 N. Y. State Rep. 141), 25.
 Winans v. Winans (19 N. J. 220), 212.
 Winchart v. State (6 Ind. 20), 416.
 Winchell v. Nat. Ex. Co. (64 Vt. 15), 10, 14.
 Windhous v. Bootz (92 Cal. 617), 439.
 Wing v. Bliss (55 Hun, 603), 86.
 Wing v. Caldwell (36 S. C. 598), 303.
 Winn v. C. P. & N. E. R. Co. (38 N. Y. State Rep. 181), 424.
 Winn v. Patterson (9 Pet. 663), 294.
 Winner v. Lathrop (67 Hun, 511), 139.
 Winship v. Connor (42 N. H. 344), 444.
 Winter v. Central Iowa R. Co. (Iowa, 54 N. W. Rep. 737), 394.
 Winter v. Meeke (25 Conn. 456), 20.
 Winter v. Truax (87 Mich. 324), 435.
 Winterfield v. Second Ave. R. Co. (66 Hun, 627), 221.
 Wise v. Grant (59 Hun, 466), 329.
 Wiseman v. Northern P. R. Co. (20 Oreg. 425), 120.
 Witascheck v. Glass (46 Mo. App. 209), 99.
 Withee v. Rowe (45 Me. 571), 360.
 Wolf v. Benedict (65 Hun, 624), 327.
 Wolf v. Perryman (82 Tex. 12), 22.
 Wolfe v. Underwood (Ala., 12 S. Rep. 234), 130.
 Wolff v. Mathews (39 Mo. App. 376), 127.
 Wood v. Ambler (8 N. Y. 170), 308.
 Wood v. Carl (4 Met. 203), 456.
 Wood v. Fiske (62 N. H. 173), 341.
 Wood v. Hicock (2 Wend. 501), 167.
 Wood v. Jackson (8 Wend. 9), 27.
 Wood v. Jefferson County Bank (9 Cow. 194), 318.
 Wood v. Mayor, etc. (73 N. Y. 556), 507.
 Wood v. Wilder (43 N. Y. 164), 91.
 Wood v. Willard (36 Vt. 82), 294.
 Wood v. Willard (37 Vt. 372), 296.
 Woodruff v. Cook (25 Barb. 505), 335.
 Woodruff v. State (Tex., 20 S. W. Rep. 573), 406.
 Woodstock v. Clark (25 Vt. 308), 323.
 Woodstock Iron Co. v. Roberts (87 Ala. 436), 400.
 Woolenslagle v. Runals (76 Mich. 545), 313.

The references are to pages.

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| <p>Woolery v. Woolery (29 Ind. 249, 254), 149, 251.</p> <p>Woolheather v. Risley (38 Iowa, 386), 215.</p> <p>Woolworth v. McPherson (55 Fed. Rep. 558), 209.</p> <p>Work v. Beach (59 Hun, 625), 187.</p> <p>Work v. McCoy (Iowa, 54 N. W. Rep. 140), 112.</p> <p>Wright v. Carman (47 N. Y. State Rep. 125), 316.</p> <p>Wright v. Doe d. Tatham (7 A. & E. 313), 371.</p> <p>Wright v. Gillispie (43 Mo. App. 244), 65.</p> <p>Wright v. Hicks (15 Ga. 160), 21.</p> <p>Wright v. Prescott (2 Barb. 196), 434.</p> <p>Wright v. Roseberry (81 Cal. 87), 120.</p> <p>Wright v. State (7 Tex. App. 574), 506.</p> <p>Wristen v. Bowles (82 Cal. 84), 190.</p> <p>Wyckoff v. Wilson (30 N. Y. State Rep. 384), 194.</p> | <p>Yeaton v. Eagle Oil & Ref. Co. (4 Wash. 183), 456.</p> <p>Yester v. Hockstettler (4 Wash. 349), 264.</p> <p>York v. Conde (66 Hun, 316), 64.</p> <p>York & M. L. R. Co. v. Winans (17 How. (U. S.) 30), 96.</p> <p>Young v. Cureton (87 Ala. 727), 479.</p> <p>Young v. Johnson (46 Hun, 164), 375.</p> <p>Young v. Johnson (123 N. Y. 223), 396.</p> <p>Young v. State (Ala., 10 S. Rep. 913), 299.</p> <p>Young v. Wempe (46 Fed. Rep. 354), 417.</p> <p>Younglove v. Nelson (Minn., 53 N. W. Rep. 629), 186.</p> <p>Youngs v. Cunningham (57 Mich. 153), 341.</p> <p>Youngs v. Heffner (36 Ohio St. 232), 442.</p> |
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Y.

- Yarbrough v. Hudson (19 Ala. 653), 122.
- Yeandle v. Yeandle (13 N. Y. State Rep. 586), 371.

Z.

- Zuchtman v. Roberts (109 Mass. 53), 509.
- Zwesler v. Storts (39 Mo. App. 163), 439.

RULES OF EVIDENCE.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

EVIDENCE — DEFINITION OF.

- § 1. In general.
- 2. Primary.
- 3. Secondary.
- 4. Positive.
- 5. Presumptive.
- 6. Hearsay.
- 7. Parol.

§ 8. Circumstantial.

- 9. Conclusive.
- 10. Direct.
- 11. Extrinsic.
- 12. Cumulative.
- 13. Competent.
- 14. Relevant.
- 15. Moral.
- 16. Satisfactory.

EVIDENCE — DEFINITION OF.

§ 1. **In general.**— The word “evidence,” in legal acceptance, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved,¹ or it is whatever is exhibited to a court or jury, whether it be by matter of record, or writing, or by the testimony of witnesses, in order to enable them to pronounce with certainty concerning the truth of any matter in dispute;² or it is that which is legally submitted to a jury to enable them to decide upon the questions in dispute or issue, as pointed out by the pleadings and distinguished from all argument or comment.³

Evidence may be considered with reference to: (1) The nature of the evidence. (2) The object of the evidence. (3) The instruments of evidence. (4) The effect of evidence.

As to its nature, evidence may be considered with reference to its being: (1) Primary evidence. (2) Secondary evidence. (3) Positive. (4) Presumptive. (5) Hearsay. (6) Admissions.

¹ Starkie Ev. 10; 1 Greenl. Ev. 3.

³ 1 Starkie Ev. 8.

² Bac. Abr., tit. Ev.

§ 2. **Primary evidence.**— Primary evidence is the best evidence the case admits of. Thus, for example, when a written contract has been entered into, and the object is to prove what it was, it is requisite to produce the original writing if it is to be obtained, and in that case no copy or other inferior evidence will be received.

§ 3. **Secondary evidence.**— Secondary evidence is that species of proof which is admissible on the loss of primary evidence, and which becomes by that event the best evidence. While it has been decided that there are no degrees in secondary evidence, and, when a party has laid the foundation for such evidence, he may prove the contents of a deed by parol, yet after proof of the due execution of the original the contents should be proved by a counterpart, if there be one, for this is the next best evidence; and it seems that no evidence of a mere copy is admissible until proof has been given that the counterpart cannot be produced.

§ 4. **Positive evidence.**— Positive or direct evidence is that which, if believed, establishes the truth of a fact in issue, and does not arise from any presumption. Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses.¹

§ 5. **Presumptive evidence.**— Presumptive evidence is that which is not direct, but where, on the contrary, a fact which is not precisely known is presumed or inferred from one or more other facts or circumstances which are known.²

§ 6. **Hearsay.**— Hearsay is the evidence of those who relate, not what they know themselves, but what they have heard from others. Such mere recitals or assertions cannot be received in evidence for many reasons, but principally for the following: First, that the party making such declarations is not on oath. And secondly, because the party against whom, if it operates, has no opportunity of cross-examination.

§ 7. **Parol evidence.**— The testimony of witnesses is called parol evidence, or that which is given *viva voce*, as contradistinguished from that which is written or documentary.

§ 8. **Circumstantial.**— Circumstantial evidence is the proof of facts which usually attend other facts sought to be proved;

¹ 1 Starkie Ev. 19.

² 1 Starkie Ev. 18.

that which is not direct evidence. Thus, when a witness testifies that a man was stabbed with a knife, and that a piece of the blade was found in the wound, and it is found to fit exactly with another part of the blade found in the possession of the prisoner, the facts are directly attested, but they only prove circumstances, and hence this is called circumstantial evidence. Circumstantial evidence is of two kinds, namely, certain and uncertain. It is certain when the conclusion in question necessarily follows; as, where a man had received a mortal wound and it was found that the impression of a bloody left hand had been made on the left arm of the deceased, it was certain that some other person than the deceased must have made such mark. But it is uncertain whether the death was caused by suicide or by murder, and whether the mark of the bloody hand was made by the assassin or by a friendly hand that came too late to the relief of the deceased.

§ 9. **Conclusive.**—Conclusive evidence is that which, while uncontradicted, satisfies the jury and judge; it is also that which cannot be contradicted.

§ 10. **Direct.**—Direct evidence is that which applies immediately to the *factum probandum* without any intervening process, as if A. testifies that he saw B. inflict a mortal wound on C., of which he immediately died.

§ 11. **Extrinsic.**—Extrinsic evidence is external evidence, or that which is not contained in the body of an agreement, contract and the like.

§ 12. **Cumulative.**—Cumulative evidence is evidence of the same kind to the same point. Thus, if a fact is attempted to be proved by the verbal admission of a party, evidence of another verbal admission of the same fact is cumulative.

§ 13. **Competent.**—By competent evidence is meant that which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case.

§ 14. **Relevant.**—By this term is understood the evidence which is applicable to the issue joined. It is relevant when it is applicable to the issue and ought to be received; it is irrelevant when it does not apply and ought to be excluded.

§ 15. **Moral evidence.**—By moral evidence is meant, not only that kind of evidence which is employed on subjects

connected with moral conduct, but all the evidence which is not obtained, either from intuition or from demonstration.¹

§ 16. **Satisfactory.**—By satisfactory evidence is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. That is to say, that which is sufficient to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest.

¹ Gambier's Moral Ev., p. 121.

CHAPTER II.

RELEVANCY AND MATERIALITY.

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| <p>§ 1. Relevancy — Meaning of.
2. Illustrations.
3. Evidence must be within the issue.
4. Must tend to prove issue when.
5. As against one of two or more defendants.
6. Proof of negative.
7. Matters pending suit.
8. Intentions, good faith, etc.
9. Illustrations.
10. Notice, knowledge, etc.</p> <p>CHARACTER AND REPUTATION.</p> <p>11. In general.
12. In criminal cases.</p> | <p>§ 13. Impeaching evidence.
14. Number of witnesses.
15. Proof of corroborating declarations.
16. Sustaining evidence.
17. Party calling a witness may show his contradictory statements.
18. Cross-examination as to collateral facts.
19. Laying foundation for contradicting witness.
20. When reputation is in issue.
21. Mode of proving reputation in other cases.</p> |
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§ 1. Relevancy — Meaning of.— The meaning of the word “relevant,” as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it, or that any two facts to which it is applied are so related to each other that according to the common course of events one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other. It comes from the French “reliever,” which means to assist. Any evidence which will assist in knowing which party speaks the truth of the issue is relevant. In determining whether evidence is relevant, all the issues must be kept in view, as it may be admissible as to one though not as to another.¹ So facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction or subject-matter, are deemed to be relevant to the fact with which they are so connected.² Thus

¹ Dilleber v. Home Life Ins. Co., 69 N. Y. 256. ² Paine v. Farr, 118 Mass. 74.

facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afford an opportunity for their occurrence or transaction, are relevant. And facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact; or if by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue, or relevant fact, highly probable or improbable.

Indecency of evidence is no objection to its being received where it is necessary to the decision of a civil or criminal right. But evidence offered in support of immaterial issues may be rejected by the court, although not objected to by either party.¹ Sir J. Stephen, in his Digest of the Law of Evidence (article 9), states the rule to be, that "Facts necessary to be known to explain or introduce a fact in issue, or relevant or deemed to be relevant to the issue, or which support or rebut an inference suggested by any such fact, or which establish the identity of any thing or person whose identity is in issue, or is deemed to be relevant to the issue, or which fix the time or place at which any such fact happened, or which show that any document produced is genuine or otherwise, or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction, or which are necessary to be known in order to show the relevancy of other facts, are deemed to be relevant in so far as they are necessary for those purposes respectively." In other words, it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less probable.² And great latitude is allowed in the reception of circumstantial evidence, and the competency of a collateral fact is not to be determined by the conclusiveness of the references it may afford as to the litigated fact. It is enough if it may tend, even in a slight degree, to assist a determination of the truth.³

§ 2. Illustrations.—(1) On the trial of an action upon a contract relating to patent rights, plaintiff claimed that it had

¹ *Corning v. Corning*, 6 N. Y. 100.

³ *Holmes v. Goldsmith*, 147 U. S.

² *Ostrander v. Snyder*, 73 Hun, 378; 150.

57 N. Y. State Rep. 289.

been modified, while defendant alleged that it had been utterly abandoned and canceled, and the defendant to sustain his position introduced a letter from plaintiff to defendant in which he referred to the fact that the contract was canceled by mutual consent. Upon plaintiff's redirect examination he stated that he wrote the letter because he saw an article in a newspaper giving the public to understand that the defendant owned the patent. The plaintiff was then allowed to put such newspaper in evidence.¹

(2) If the making of any loan by a party is denied, evidence of his poverty at the time is competent as tending to disprove it. Thus, in an action on a note alleged to have been given for money loaned, the defense being that the note is a forgery and the loan a fiction, evidence tending to prove the payee's want of means to make the loan, and evidence tending to show that the maker was a borrower of money, is admissible.² So, to fortify the presumption of payment from great lapse of time, testimony that the debtor has been in good and the creditor in poor circumstances during such time is admissible.³

(3) It is undoubtedly the general rule that, when a witness has been proved to have made contradictory statements, his evidence cannot be supported by proving that at other times he had made statements in harmony with his evidence. There are, however, well settled exceptions to the rule; thus, when the witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So in contradiction of evidence tending to show that the account of the transaction given by the witness is a falsification of late date, it may be shown that the same account was given by him before its ultimate operation and effect arising from a change of circumstances could have been foreseen.⁴

¹ *Minor v. Barron et al.*, 131 N. Y. 677; 43 N. Y. State Rep. 930; *Weinberg v. Kran*, 44 id. 126 (Feb. 1, 1892).

² *Dryer v. Brown*, 23 N. Y. State Rep. 695; 52 Hun, 321.

³ *In the Matter of Keenan*, 56 N. Y. State Rep. 137 (Nov. 17, 1893).

⁴ *Gilbert v. Sage*, 57 N. Y. 639;

Wharton's Ev., § 570; *Greenl. Ev.*, § 469; *Robb v. Hackley*, 23 Wend. 50; *Dudley v. Bolles*, 24 id. 471; *Herrick v. Smith*, 13 Hun. 446; *Hotchkiss v. Germania F. Ins. Co.*, 5 id. 90; *Matter of Hesdra*, 28 N. Y. State Rep. 810; 119 N. Y. 615.

(4) Proof of the happening of a prior accident in the same place is held to be competent upon the ground that it tends to show that, tested by actual use, the place of the accident has been demonstrated to be unsafe and dangerous. And it seems that, where it is shown that the conditions are similar, evidence of the occurrence of an accident in some other place may be proper for the same purpose.¹

§ 3. **Evidence must be within the issue.**—The first rule governing in the production of evidence is that the evidence offered must correspond with the allegations and be relevant to facts put in controversy by the pleadings.² It is a fundamental rule that judgment shall be "*secundum allegata et probata*," and any departure from that rule is certain to produce surprise, confusion and injustice; for pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, the complaint will serve no useful purpose, but will rather ensnare and mislead his adversary. To allow a party to recover upon a different cause of action from that stated in his pleading is to ignore the whole office of a pleading and compel parties to try their cases in the dark, informing them for the first time after the wrong is irremediable of the issue which they should have tried. The pleadings cannot lawfully be amended in a material respect except at a time which will give the party against whom the amendment is allowed a right and opportunity to meet by proof the allegations made against him. There are cases which, having

¹Brady v. Manhattan R. Co., 127 N. Y. 46; 37 N. Y. State Rep. 340. And in Quinlan v. Utica, 74 N. Y. 603; Pomfrey v. Saratoga, 104 id. 469; 5 N. Y. State Rep. 802; and Masters v. Troy, 20 id. 273; 123 N. Y. 628, it was held that proof that other persons had fallen on the walk at the place where the plaintiff was injured was admissible to show the condition of the place. In Stewart v. Porter Mfg. Co., 13 N. Y. State Rep. 221, it was held that the fact that, within a month prior to the time that the

plaintiff's horses were frightened, other horses were frightened by the same place, was relevant. See Wilson v. Town, etc., 57 Hun, 589; 32 N. Y. State Rep. 532; McCarragher v. Rogers, 31 id. 595; 120 N. Y. 526.

²Nickerson v. Gould, 82 Me. 512; Lowe v. Greenwood, 30 Ill. App. 184; Benedict v. Seventh Ward R. Co., 51 Hun, 11; 24 N. Y. State Rep. 169; Kingman, P. & W. R. Co. v. Quinn, 45 Kan. 477; Newby v. Myers, 44 Kan. 477; Traver v. Shaeffe, 33 Neb. 531.

proceeded in disregard of the pleadings, and wherein the whole case has been presented by both parties in their proofs without objection, in which an amendment has been allowed, after the evidence is closed, to conform the pleadings to the proofs; so, also, where the court can see that a trial has been had upon the real issue without objection, it will not disturb a recovery upon the ground that it was not embraced in the pleadings; but when the objection has been properly taken, or an exception presents the question, it is fatal to a recovery that it does not conform in all respects to the allegations of the pleadings.¹

Evidence contradictory of the fact alleged in the complaint and not denied by the answer is inadmissible.² Evidence not within the issue made by the pleadings is irrelevant and incompetent even in equity cases.³ Thus, a defendant cannot give testimony to show whether or not plaintiff's counsel has taken the case to prosecute on a percentage or whether or not he is bearing the expenses of the litigation.⁴ It may also be laid down as a general rule that, in criminal as in civil cases, the evidence shall be confined to the point in issue. In criminal proceedings it has been observed⁵ that the necessity is stronger, if possible, than in civil cases, of strictly enforcing this rule; for where a person is charged with an offense it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment and matters relating thereto, which alone he can be expected to come prepared to answer. Of course all evidence directly bearing on any offense which can be, and is, under the indictment before the jury, made the subject of inquiry, is admissible. So also, and almost equally as a matter of course, evidence may be given, not only of the actual guilty act itself, but of other acts so closely connected

¹ *Romeyn v. Sickles*, 108 N. Y. 650; 47 N. Y. State Rep. 418; *Richardson v. Davis*, 70 Miss. 219.

² *Russell v. Andrae*, 84 Wis. 347.

⁴ *Palmer v. Michigan C. R. Co.*, 93

³ *Dodge City v. Wright*, 48 Kan. 667; *Scully v. Book*, 3 Wash. 182; *Equitable Bank v. Claassen*, 51 N. Y. State Rep. 503 (March 25, 1893); *Waterman v. Shipman*, 65 Hun, 622;

Mich. 363; *Hancock v. McAvoy*, 151 Pa. St. 439; *Prince v. Gundaway*, 157 Mass. 417; *State v. McCoy*, 111 Mo. 517; *Com. v. Cloonen*, 151 Pa. St. 605.

⁵ 2 *Russell*, by Greaves, 772.

therewith as to form part of one chain of facts, which could not be excluded without rendering the evidence unintelligible. It is never essential to prove surplusage, and when such proof is offered it should be rejected. The term "surplusage" comprehends whatever may be stricken from the record without affecting the issue. But it is not every immaterial or unnecessary allegation that is surplusage.¹

§ 4. **Must tend to prove issue when.**—Each party to an action must proceed upon some definite theory, and the evidence introduced by him must support that theory.² It is not necessary, however, that the evidence should bear directly upon the issue; it is sufficient if it tends to prove the issue, or constitutes a link in the chain of proof.³ And evidence ought never to be adjudged irrelevant which, according to ordinary experience and the common observation of the motives and conduct of men, may fairly be supposed to influence and persuade candid and intelligent minds.⁴ Thus, a witness may testify to the existence of any collateral fact tending to enable him to remember the principal fact or strengthen his conviction of its truth.⁵

The exclusion of testimony on the ground that it is immaterial is a holding that no inquiry on that subject will be allowed, and is error if the subject-matter of the inquiry is material in the determination of any of the issues raised.⁶ But evidence the relevancy of which is not apparent, and which may be prejudicial to the other party, is inadmissible, even upon the understanding that, unless the party tendering it produces other testimony which will make it competent, it may be excluded.⁷

¹ *Grace v. Dempsey*, 75 Wis. 313.

² *Wagner v. Winter*, 122 Ind. 57; *Hood v. Olin*, 80 Mich. 296.

³ *Colglazier v. Colglazier*, 124 Ind. 196; *People v. Hare*, 57 Mich. 505; *Hunter v. Harris*, 131 Ill. 482; 24 Ill. App. 638; *Cleveland, C., C. & I. R. Co. v. Closser*, 126 Ind. 348; 43 Alb. L. J. 209.

⁴ *Copp v. Hardy*, 32 Mo. App. 588;

Dutton v. Kneebbs (Iowa), 45 N. W. Rep. 875; *Passmore v. Passmore*, 60 Mich. 463.

⁵ *Louisville, E. & St. L. R. Co. v. Hart*, 2 Ind. App. 130.

⁶ *Winchell v. National Exp. Co.*, 64 Vt. 15; *Wills v. Higgins*, 132 N. Y. 459; 44 N. Y. State Rep. 608.

⁷ *State v. Thomas*, 99 Mo. 235; *Skel-lie v. Central Railroad & Bkg. Co.*, 81 Ga. 56.

§ 5. As against one of two or more defendants.—One defendant is not entitled to have excluded in its entirety evidence which is admissible against his co-defendant, his remedy being to ask instructions limiting its effect so as to confine its influence to the latter.¹ Thus, in an action against two for the commission of a tort, evidence is admissible, if competent, as against either party. If incompetent as against the other, its use and application must be limited by proper instructions.²

§ 6. Proof of negative.—Negative evidence is secondary evidence in character. But persons who were in a position to have heard may testify that they did not hear, although it does not affirmatively appear that they were looking, watching or listening.³ So negative evidence is proper in many cases. Thus, negative testimony may be introduced by the defendant in support of his good character.⁴ So testimony that plaintiff, in an action for injuries alleged to have been received by being thrown from a street-car by the driver, made no claim that he had been so thrown immediately after the accident, is admissible.⁵ And plaintiff in an action for assault and battery is entitled to show that she took no part in a quarrel between others from which the assault arose, and that the assault upon her was unprovoked and wanton.⁶ So where the evidence of plaintiff for a wrongful discharge from employment and the manager of defendant's corporation is conflicting as to plaintiff's fidelity, it is proper to prove by plaintiff that the manager had never objected to his fidelity.⁷

§ 7. Matters pending suit.—As a general rule no evidence of any fact tending to aggravate or diminish the damages which has occurred after the commencement of the action should be admitted.⁸ Thus, evidence of defendant's adultery

¹ *Owens v. State*, 94 Ala. 97; *Smith Street R. Co.*, 46 N. Y. State Rep. 386.
v. Collins, id. 394.

² *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481. ⁶ *Pokriefka v. Muckurat*, 91 Mich. 399.

³ *Greany v. Long Island R. Co.*, 101 N. Y. 419. ⁷ *Linton v. Unexcelled Fireworks Co.*, 128 N. Y. 672; 32 N. Y. State Rep. 1108.

⁴ *Hussey v. State*, 87 Ala. 121.

⁵ *Kummer v. Christopher & T.* ⁸ *Dent v. Pickens*, 34 W. Va. 240.

subsequent to the filing of a bill for divorce is inadmissible.¹ And as a general rule, matters arising after the commencement of an action must be brought to the attention of the court, if at all, by a supplemental pleading.² And in *Eccles v. Rodman*³ it is held that, in an action for libel, evidence of the repetition of the libel or the publication of other libelous matter after the commencement of the action is inadmissible for any purpose. But in some states the above general rule seems to have some exceptions. Thus, it has been held that an article published by defendant pending an action for libel may be admissible as a republication of the libel to show malice;⁴ and that defendant's declarations made after the commencement of a suit against him for slander may be admitted in evidence upon the question of malice.⁵

§ 8. **Intentions, good faith, etc.**—When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice or other state of the mind, or of any state of body or bodily feeling, the existence of which is in issue, or is, or is deemed to be, relevant to the issue; but such acts or words may not generally be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner.⁶

§ 9. **Illustrations.**—(a) A person who is competent to prove his motives and intentions may state in general terms that he did or refrained from doing a particular thing material to the issue on account of information received from a third person, but cannot go into details or give conversations with third persons held out of the hearing of the opposite party.⁷

¹ *Foval v. Foval*, 39 Ill. App. 644.

⁵ *Morasse v. Brochu*, 25 N. E. Rep.

² *Ferris v. Tannebaum*, 39 N. Y. 74.

State Rep. 71.

³ 57 N. Y. State Rep. 657.

⁶ *Stephen's Dig. of the Law of Ev.*, art. 11; *Butler v. Watkins*, 13 Wall.

⁴ *Welch v. Tribune Pub. Co.*, 82

Mich. 661; *Eldridge v. State*, 27

Fla. 162; *Moore v. Carter*, 146 Pa.

St. 492; *Gray v. Parke*, 155 Mass.

433.

457; *Lincoln v. Claffin*, 7 id. 132; *Castle v. Bullard*, 23 How. (U. S.) 172; *Bottomly v. United States*, 1 Story Rep. 135; *Rosc. N. P.* 739.

⁷ *Lawson v. Conaway*, 37 W. Va. 159.

(b) Declarations of a wife while leaving her husband's house and on the way to that where defendant was stopping and after reaching there, and her refusal at defendant's request to return to her husband, with the reasons given, are admissible in an action for alienating her affections as part of the *res gestæ*.¹ It may also be shown that she caused her husband to be prosecuted just before leaving him.

(c) Declarations, introduced solely to show the state of mind or intention of the maker at the time they were made, are acts from which her state of mind or intention may be inferred in the same manner as from her appearance, behavior or actions generally.²

(d) On the issue as to whether an employee's negligent act by which a third person sustained injuries was within the scope of his employment, or was merely for his own amusement and to gratify his idle curiosity, he may testify that he was not acting in the course of his employment, but merely for his own amusement.³

(e) A witness may be asked for what reason he did not examine certain premises which he was sent to examine.⁴

(f) In an action for the purchase-price of a steam-heating tank, plaintiff's machinist may testify as to the declarations of the fireman and engineer of the defendant that they thought that the tank was all right.⁵

(g) To prove the substantive fact of damage, but not to prove the meaning of the words used nor the innuendo charged, witnesses who received an alleged libelous circular letter may testify as to the effect produced upon them thereby.⁶

(h) In an action for breach of promise of marriage, it is competent, for the purpose of showing how plaintiff was affected by defendant's marriage to another woman, to ask witness how it affected or seemed to affect her; and an answer that she was downhearted is admissible.⁷

¹ Rudd v. Rounds, 64 Vt. 432.

⁵ Logan v. Berkshire Apart. Ass'n,

² Com. v. Trefethen, 157 Mass. 180. 52 N. Y. State Rep. 132.

³ Brunner v. American Teleg. & Teleph. Co., 151 Pa. St. 447.

⁶ Warner v. Clark, 45 La. Ann. 897.

⁴ McCarthy v. Gallagher, 53 N. Y. State Rep. 176.

⁷ Robertson v. Craver (Iowa), 55 N. W. Rep. 492.

(i) On the issue as to whether there was a *bona fide* and substantial compliance with an agreement to build a party-wall by the one who erected it, he may be asked whether he intended to have the wall built correctly.¹

(j) Evidence of repetition of slander alleged and proved is admissible in determining defendant's motive and in fixing damages.²

(k) Similar fraudulent acts committed about the same time, and when the same motive may reasonably be supposed to exist, are admissible in evidence to establish the intent of one party to a transaction claimed by the other party to have been fraudulent.³

§ 10. Notice, knowledge, etc.—Proof of the happening of a prior accident in the same place has frequently been held to be competent upon the ground that it tends to show that, tested by actual use, the place of the accident has been demonstrated to be unsafe and dangerous; and it seems where it is shown that the conditions are similar, evidence of the occurrence of an accident in some other place on the same railway may be proper for the same purpose.⁴ And proof that other persons had fallen on the walk where the plaintiff was injured is admissible to show the condition of the place.⁵ So the fact that, within a month prior to the time that the plaintiff's horses were frightened, other horses were frightened by the same place, is relevant to show notice.⁶ Notice to the defendant of the defect in his premises which caused the injury may be presumed from its existence for a sufficient length of time previously;⁷ thus, evidence that other cars had left the track of a street railway company at or about the same place, both before and after the derailment complained of, is admis-

¹ Hammann v. Jordan, 129 N. Y. 5 N. Y. State Rep. 802; Masters v. 61; 41 N. Y. State Rep. 124. Troy, 123 N. Y. 628; 20 N. Y. State

² Ransom v. McCurley, 140 Ill. 626; Rep. 273.

³ McCleneghan v. Reid, 34 Neb. 472; ⁶ Stewart v. Porter Mfg. Co., 13 N. Y. State Rep. 221; Wilson v. Town, Norton v. Livingston, 64 Vt. 478. 57 Hun, 589; 32 N. Y. State Rep. 532;

⁴ McCasker v. Enright, 64 Vt. 488; McCarragher v. Rogers, 120 N. Y. O'Day v. Chaffee, 64 Hun, 637; 46 N. Y. State Rep. 595. 747.

⁵ Brady v. Manhattan R. Co., 127 N. Y. 46; 37 N. Y. State Rep. 340. ⁷ Smith v. Des Moines, 84 Iowa, 685; Winchell v. National Exp. Co., 64 Vt.

⁶ Quinlan v. Utica, 74 N. Y. 603; 15. Pomfrey v. Saratoga, 104 id. 469;

sible to show notice to the company of their liability to leave the track.¹ So testimony tending to show that a horse was in the habit of stumbling is admissible in a suit for personal injuries sustained by being thrown from a carriage by the horse stumbling over an alleged defect in the highway, where there is also evidence tending to show that, from long-continued ownership by her husband, plaintiff had ample opportunity to learn that the horse was a habitual stumbler.² Evidence that the plaintiff, claiming to be a *bona fide* purchaser of the note sued on, which was given in a fraudulent transaction for hulless oats, knew previously of the dealing in such oats in the neighborhood, and that people were liable to be swindled thereon, as he alleged his son to have been, is admissible on the question of good faith.³

CHARACTER AND REPUTATION.

§ 11. **In general.**— While the fact that a person is of a particular character is deemed to be irrelevant to an inquiry respecting his conduct in civil cases, and the fact that the character of any party to the action is such as to affect the amount of damages which he ought to receive, is generally deemed to be irrelevant unless such character is put in issue by the defense, in criminal proceedings the fact that the person accused has a good character is relevant, but that he has a bad character is incompetent, unless it is itself a fact in issue, or unless evidence has been given that he has a good character.

§ 12. **In criminal cases.**— Evidence of character is admissible for the prisoner, who may show by general evidence that his character is such that he is not likely to have committed the offense which is imputed to him. He can only support that part of his character which is impeached, and only by general evidence — not by evidence of his conduct on particular occasions. The proper form of the question is, “From your knowledge of the prisoner, does he bear a good

¹ Brooklyn St. R. Co. v. Kelley, 6 Ohio C. C. 155.

³ Griffith v. Shipley, 74 Md. 591; Cover v. Myers, 74 Md. 406; Mohr v. Miesen, 47 Minn. 228.

² Judd v. Claremont (N. H.), 23 Atl. Rep. 427. And see Merrill v. Hole (Iowa), 52 N. W. Rep. 4.

character for honesty, humanity, etc.," as the case may be. Good character is evidence, but not strong, in favor of the accused.¹ It is in a case of doubt, or to rebut the legal presumption arising from the possession of stolen articles, that evidence of good character has most weight.² It is now the general rule that evidence of good reputation of the accused is competent to disprove guilt.³ The prisoner's character cannot be put in issue by the state, unless he opens the door by giving testimony to it.⁴ But it is not a conclusion of law that from his silence the jury are to believe that he is a man of bad character.⁵ When a defendant has of his own accord put his character in issue, the examination may extend to particular facts.⁶

(1) When the character of an individual in regard to any particular trait or as developed under peculiar circumstances is in issue, it is to be established by evidence of general reputation and not by positive evidence of general bad conduct.⁷ When a particular trait of character is in issue, evidence of character must be restricted to that trait.⁸ To authorize a witness to testify to the general character of a person in respect to his habits, he should first state that he is acquainted with that person's general character in the particular to which he deposes; but if his testimony shows that fact, whether brought out on preliminary examination or examination in chief, it will be sufficient.⁹

(2) If on the trial of an indictment the defendant introduces evidence of his good character prior to the alleged commission of the crime charged, it is competent for the government to prove that subsequently to that time his character had been bad.¹⁰ When character is put in issue, evidence of particular

¹ *Com. v. Hardy*, 2 Mass. 317; *Schaller v. State*, 14 Mo. 502; *McDaniel v. State*, 8 Sm. & M. 401; *Felix v. State*, 18 Ala. 720; *Cancemi v. People*, 2 Smith, 501.

² *State v. Ford*, 3 Strobbh. 517; *Epps v. State*, 19 Ga. 102.

³ *State v. Douglass*, 44 Kan. 618; *Hall v. State*, 132 Ind. 317; *State v. Howell*, 100 Mo. 628.

⁴ *People v. White*, 14 Wend. 111; *Com. v. Webster*, 5 Cush. 295.

⁵ *State v. O'Neal*, 7 Ired. 251; *Ackley v. People*, 9 Barb. 609; *People v. Bodine*, 1 Dana, 282.

⁶ *Com. v. Robinson*, Thacher's *Crim. Cas.* 236.

⁷ *Keener v. State*, 18 Ga. 194.

⁸ *State v. Dalton*, 27 Mo. 13; *People v. Josephs*, 7 Cal. 129.

⁹ *Elam v. State*, 25 Ala. 53.

¹⁰ *Com. v. Sackett*, 22 Pick. 394.

facts may be admitted, but not where it comes in collaterally.¹ The credit of a witness may be impeached by showing that he was intoxicated at the time the events happened to which he testifies,² though general character for intemperance is inadmissible.³

§ 13. **Impeaching evidence.**—It is not necessary that the character testified to should be proved to be that of the place where he resides. Neighborhood is co-extensive with intercourse.⁴ A witness who is introduced to prove that another witness is unworthy of credit should be examined as to the general character of each witness for truth and veracity. The proper inquiry is whether the witness knows the general character of the witness attempted to be impeached, and if so, what is his general reputation for truth. Such witness must profess to know the general reputation of the witness sought to be discredited before he can be heard to speak of his own opinions or of the opinions of others as to the reliance to be placed on the testimony of the impeached witness.⁵ The proper inquiries are: What is the general reputation of the witness as to truth; whether, from general reputation, the person testifying would believe such witness under oath as readily as men in general; or whether, from such general character, they would believe the witness on oath.⁶ On the cross-examination the inquiry should be limited to the witness' opportunity for knowing the character of such witness; for how long a time and how generally such unfavorable reports have prevailed, and from what sources they have been derived; the origin of the reports against him and from whom and where he heard them.

§ 14. **Number of witnesses.**—After an equal number of witnesses have been sworn on each side in the impeaching or supporting of the character of a party or witness, it is in the discretion of the presiding judge whether a greater number of witnesses shall be examined.⁷

¹ Com. v. Moore, 2 Dana, 402. See Sachet v. May, 3 id. 80.

² Tuttle v. Russell, 2 Day, 201; Fleming v. State, 5 Humph. 564.

³ Brindle v. McIlvaine, 10 Serg. & Rawle, 282.

⁴ Chess v. Chess, 1 Pa. 32.

⁵ Phillips v. Kingsfield, 19 Me. 375; State v. Parks, 3 Ired. (N. C.) L. 296;

State v. O'Neal, 4 id. 88.

⁶ Johnson v. People, 3 Hill, 178; State v. Howard, 9 N. H. 485.

⁷ Bunnell v. Butler, 23 Conn. 65; Bissell v. Cornell, 24 Wend. 354.

§ 15. **Proof of corroborating declarations.**—Proof of declarations of a witness made out of court, in corroboration of testimony given by him on the trial of the cause, is, as a general and almost universal rule, inadmissible. It seems, however, that to this rule there are exceptions, and that under special circumstances such proof will be received; as, when the witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So in contradiction of evidence tending to show that the account of the transaction given by the witness is a fabrication of late date, it may be shown that the same account was given by him before its ultimate effect and operation arising from a change of circumstances could have been foreseen.¹

§ 16. **Sustaining evidence.**—Testimony to support the character of a witness cannot be given in evidence unless the credibility of the witness is impeached.² A witness called to sustain the character of an impeached witness, testifying that he has known him for a number of years, and that he knows his associates, but is not acquainted with his general character for truth and veracity, will be allowed to testify that he will believe him on his oath.³ It is not necessary that a man's character should have been matter of discussion amongst his neighbors to enable a witness to speak of his reputation for truth.⁴ Witnesses in his neighborhood acquainted with the character of the impeached witness, although they had never heard anything for or against his veracity, may testify that they would believe him on oath.⁵ An attempt to impeach

¹ *Robb v. Hackley*, 23 Wend. 50; *State v. Thomas*, 3 Strobb. 269. And in *State v. Dore*, 10 Ired. 469, and *State v. Dennis*, 32 Vt. 158, it was held that, when a witness is impeached on the ground of bad character, evidence may be given of previous statements made by the witness consistent with his testimony on the trial. And in *March v. Harrell*, 1 Jones' L. (N. C.) 329, it was held that when the credibility of a witness has been attacked from the nature of his evidence, from his

situation, from bad character, from proof of previous inconsistent statements, or from imputations directed against him on cross-examination, the party introducing him may prove other consistent statements for the purpose of corroborating him.

² *Colt v. People*, 1 Parker's Crim. Rep. 611.

³ *People v. Davis*, 21 Wend. 309.

⁴ *Crabtree v. Rile*, 21 Ill. 180; *Boon v. Weathered*, 23 Tex. 675.

⁵ *Taylor v. Smith*, 16 Ga. 7.

a witness by asking another witness what was his character for truth warrants the introduction of evidence to support his character, though the answer to the question was that his character was good.¹ On the trial of an indictment for adultery, if one act of adultery, committed by the defendant with the woman named in the indictment, is proved by the testimony of a witness whose credit is impeached, other instances of improper familiarity between the defendant and the same woman, not long before, may be given in evidence to corroborate the witness.² An attesting witness is a witness of the law, and may be discredited by any one who examines him.³ The rule that a party cannot discredit his own witness by proving that he had made contradictory statements at other times does not apply to those cases where the party is under the necessity of calling the subscribing witness to an instrument.⁴

§ 17. Party calling a witness may show his contradictory statements.—Although a party calling a witness shall not be allowed to impeach his general character, yet he may show that he has told a different story at another time.⁵ Where a witness gives evidence against the party calling him, and is an unwilling witness, or in the interest of the opposite party, he may be asked by the party calling him, at the discretion of the court, whether he has not, on a former occasion, given different testimony as to a particular fact.⁶ But the general rule is that a party cannot be allowed to insist that his own witness is not to be believed. He has the right, if surprised by his testimony, to show by other witnesses the facts testified to are otherwise. But he cannot impeach him directly or indirectly.⁷ This rule has been changed in England so far as regards civil proceedings, and the following rule was laid down by the Common-law Procedure Act of 1854, which provides, in section 22, that a party producing a witness may, “in case the witness shall, in the opinion of the judge, prove adverse, con-

¹ *Com. v. Ingraham*, 7 Gray, 46.

⁴ *Dennett v. Dow*, 17 Me. 19.

² *Com. v. Merriam*, 14 Pick. 418.

⁵ *Cowder v. Reynolds*, 12 Serg. & Rawle, 281.

³ *Crowell v. Kirk*, 3 Dev. 355. See *Jackson v. Varick*, 7 Cow. 238. *Contra*, *Whitaker v. Salisbury*, 15 Pick. 534; *Patterson v. Schenck*, 3 Green, 434; *Booker v. Bowles*, 2 Blackf. 90.

⁶ *Bank of Northern Liberties v. Davis*, 6 Watts & Serg. 285.

⁷ *Hunt v. Fish*, 4 Barb. 324; *Burkhalter v. Edwards*, 16 Ga. 595.

tradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but, before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether he made such statement or not." In Ireland this enactment has been made to apply to both civil and criminal cases.¹ It contains, however, an extraordinary blunder, because it has made the contradicting of a witness on material points by the party who calls him dependent in all cases on his proving adverse in the opinion of the judge — by adverse being meant hostile; whereas it can hardly have been the intention of the legislature thus to narrow the old rule in civil cases.²

§ 18. Cross-examination as to collateral facts.— A witness may be cross-examined as to any collateral fact which has any tendency to test either his accuracy or veracity, but the party must be bound by the answers of the witness, and cannot adduce proof in contradiction of such answers. And if in the course of the trial testimony is given without objection tending to contradict such answers, it is not even then competent for the party offering the first witness to give independent proof tending to corroborate the witness as to these collateral matters.³ Thus, in respect to collateral matters drawn out by cross-examination, the answers of the witness are in general to be regarded as conclusive. The exception to this rule is when the cross-examination is as to matters which, though collateral, tend to show the temper, disposition or conduct of the witness toward the cause or the parties. The answers of the witness as to these matters may be contradicted;⁴ that is to say, a witness cannot be cross-examined on immaterial matters in order to contradict him and impeach his credibility.⁵ It is not collateral but relevant to the main

¹ 19 & 20 Vict., ch. 102, sec. 25.

⁴ *State v. Patterson*, 2 Ired. (N. C.)

² *Greenough v. Eccles*, 28 L. J. C. 346.

P. 160. The questions discussed in regard to the rule will be found collected in 2 Phill. & Amos, Ev., ch. 10, § 4.

³ *Stevens v. Beach*, 2 Vern. 585.

⁵ *People v. McGinnis*, 1 Park. Cr. Rep. 387; *Rosenbaum v. State*, 33 Ala. 354; *Blakey v. Blakey*, id. 611; *Orton v. Jewitt*, 23 id. 19; *Winter v. Meeker*, 25 Conn. 456; *Cokely v. State*, 4 Iowa,

issue to inquire into the motives of a witness, and a party who examines him in regard to them is not bound by his answers, but may contradict them.¹ The means afforded by a *viva voce* examination of judging of the credit due to witnesses, especially where their statements conflict, are of incalculable advantage in the investigation of truth, but not unfrequently supply the only true test by which the real character of the witnesses can be appreciated.² On the cross-examination of a witness the party should be allowed to show whatever may indicate the probable relations between the witness and the party; and, whether they be friendly or unfriendly, is always admissible for the purpose of affecting the degree of credit which his evidence should receive. A witness may be asked any question tending to show that he is not impartial, and if he denies the facts suggested he may be contradicted, so he may be required to explain whatever would show bias on his part.³

§ 19. **Laying foundation for contradicting witness.**—A witness may be cross-examined as to prior conversations with third persons which tend to show ill-will on his part towards the party against whom he is called, both for the purpose of affecting his credibility and of laying the foundation for the contradiction of his testimony.⁴ But a witness must be inquired of as to time, place and person before he can be impeached by calling witnesses to contradict him.⁵ Thus, before a witness can be contradicted by his own statements made out of court, his attention must be specially called to them; it is not enough to ask a general question without naming the person.⁶ A witness may be impeached by show-

477; Morgan v. Freese, 15 Barb. 352; Mitchum v. State, 11 Ga. 615; State v. Thibau, 30 Vt. 100; Cornelius v. Com., 15 B. Mon. 539.

¹ Collins v. Stevens, 5 Gray, 438; Newcomb v. State, 37 Miss. 383; People v. Austin, 1 Park. Cr. Con. 154; Bersch v. State, 13 Ind. 484.

² Schreiber v. Schreiber, 52 N. Y. State Rep. 436 (May, 1893).

³ Matter of Mason, 60 Hun, 46; 38 N. Y. State Rep. 533.

⁴ Powell v. Martin, 10 Iowa, 568.

⁵ Wright v. Hicks, 15 Ga. 160.

⁶ Hedge v. Clapp, 22 Conn. 262; State v. Masler, 2 Ala. 43; Cook v. Brown, 3 N. H. 460; Brown v. Kimball, 25 Wend. 259; Conrad v. Griffey, 16 How. (U. S.) 38; Smith v. People, 2 Mich. 415; Bryan v. Walter, 14 Ga. 485; Budlong v. Van Nostrand, 24 Barb. 25; Vatton v. National, etc. Assur. Soc., 22 id. 9; Atkins v. State, 16 Ark. 568; Anis v. Charlton's Adm'r., 12 Gratt. 484; Sutton v. Reagan, 5 Blackf. 217; State v. Davis, 29 Mo.

ing that he has made contradictory statements, although his denial of such statements is not positive, but merely that he does not remember them.¹ A witness whose credit has been impeached by evidence of contradictory statements cannot be sustained by proof of good character.²

§ 20. **When reputation is in issue.**—When the plaintiff's general character is involved in the issue, its nature may be shown, and proof of it is not confined to reputation only. Thus, where the answer in an action puts in issue the good character of the plaintiff, the witnesses for plaintiff may testify that in their individual opinions the plaintiff's character is good; that the witnesses know nothing to the contrary.³

§ 21. **Mode of proving reputation in other cases.**—Evidence of general reputation as to a gambling house or disorderly house is not admissible, but such reputation may be proved by proof of the character of the women who frequent such a house, and the character and conduct of the men, and the effect upon the neighborhood. The character of the persons who are in the habit of visiting the house may be proved by reputation.⁴ Reputation in the family is admissible on the question of whether the relation between a man and woman who lived together for years was that of marriage.⁵ In an action for malicious prosecution, evidence of plaintiff's bad character is admissible upon the general issue in behalf of defendant where plaintiff's allegations of damage are general.⁶ But such reputation cannot be established by proof of specific acts.⁷ In an action for libel or slander, evidence of plaintiff's character in the vicinity in which she lived is not admissible in mitigation of damages unless pleaded.⁸ But where it is in

391; *Joy v. State*, 14 Ind. 139; *Cook v. Hunt*, 24 Ill. 535; *Baker v. Josephs*, 16 Cal. 173; *Mendenhall v. Banks*, 16 Ind. 284; *Juda v. Johnson*, 2 id. 371; *Morrison v. Myers*, 11 Iowa, 538.

¹ *Ray v. Bell*, 24 Ill. 444; *Nute v. Nute*, 41 N. H. 60.

² *Russell v. Coffin*, 8 Pick. 143; *Rogers v. Moore*, 10 Conn. 13.

³ *Graves v. Gilchrist*, 29 N. Y. State Rep. 638.

⁴ *United States v. Stevens*, 4 Cranch

C. C. 341; *People v. Hulett*, 61 Hun, 620; 39 N. Y. State Rep. 646. But see *State v. Mack*, 41 La. Ann. 1079; *State v. Lee* (Iowa), 45 N. W. Rep. 545; *State v. Chisenhall*, 106 N. C. 676; *People v. Fick*, 89 Cal. 144.

⁵ *Arnold v. Cheesebrough*, 46 Fed. Rep. 700; *White v. White*, 82 Cal. 427.

⁶ *Taylor v. Dominick*, 36 S. C. 368.

⁷ *Wolf v. Perryman*, 82 Tex. 12.

⁸ *Ward v. Dean*, 56 Hun, 585; 32 N. Y. State Rep. 270.

issue, evidence of general character is not confined to reputation only.¹ Stories told of plaintiff after the publication of libel are inadmissible.² Evidence of general reputation for chastity of the prosecutrix for seduction under promise of marriage is admissible in corroboration of her testimony as to her previous chaste character.³ To justify evidence, on a murder trial, of the dangerous character of the deceased, it must be shown that he made hostile demonstrations against the accused at the time of the homicide.⁴

¹ *Graves v. Gilchrist*, 29 N. Y. State Rep. 638.

² *Morrison v. Press Pub. Co.*, 133 N. Y. 538; 38 N. Y. State Rep. 357.

³ *State v. Lockerby*, 15 Crim. Law Mag. 915.

⁴ *Perry v. State*, 94 Ala. 25; *State v. Taylor*, 44 La. Ann. 783; *State v. Mitchell*, 41 id. 1073. But see *King*

v. State, 55 Ark. 604; *State v. Rose*, 47 Minn. 47.

CHAPTER III.

EVIDENCE UNDER PARTICULAR PLEADINGS.

IN GENERAL.

- § 1. Custom.
- 2. Title in a stranger.
- 3. Failure to deny — Effect of.
- 4. Promise to pay note after dishonor — Proof of protest.
- 5. Under plea of a statute.
- 6. Defense.
- 7. *Res adjudicata*.
- 8. Limitations.
- 9. Discharge from debts.
- 10. Release.
- 11. Matter of inducement — Libel and slander.
- 12. Special damage.
- 13. Trespass.
- 14. Negligence.
- 15. Composition — Payment — Infancy, etc.
- 16. Illegality.
- 17. Performance.
- 18. Warranty of title.
- 19. Ownership.

- § 20. General denial — Value.
- 21. Fraud.
- 22. Contract with common carriers.
- 23. Actions on judgments.
- 24. Eviction.
- 25. Negotiable paper.
- 26. Work and materials.
- 27. Sale of personal property.
- 28. Money had and received.
- 29. Actions against receivers, etc.
- 30. Partnership actions.
- 31. Public officers.
- 32. Married women.
- 33. Heirs and next of kin.
- 34. Admission in pleading.
- 35. Attacking an instrument set up as a counter-claim.
- 36. Proof of defenses arising after suit brought.
- 37. Explaining inconsistencies between testimony and pleading.

IN GENERAL.

Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party could allege one cause of action and then recover upon another, his complaint would serve no useful purpose, but rather ensnare and mislead his adversary. The relief must be consistent with the case made by the complaint and embraced within the issue. All facts which, by the form of the pleadings in any action, are affirmed on one side and denied on the other, are "facts in issue." But in actions in which there are no pleadings, or in which the form of the pleadings is such that distinct issues

are not joined between the parties, all facts from the establishment of which the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any such case would by law follow are "facts in issue." In the absence of objections to the sufficiency of a complaint it is the duty of the trial court to give the plaintiff the benefit of any cause of action established by the evidence; and upon appeal the appellate court will consider the cause of action disclosed by the evidence, without regard to any objections to the sufficiency of the pleadings which were not made in the trial court.¹

§ 1. Custom.—Evidence of custom or usage is not admissible without an allegation in the pleadings of the existence of the custom.²

§ 2. Title in a stranger.—In an action for the wrongful detention of property, a general denial puts in issue not only the detention but the plaintiff's title to the property, and defendant under such a plea may show title in a stranger although he does not connect himself with such title. This broad and general statement of the rule, however, would not enable one who had taken property from the actual possession of another to justify the taking by the allegation and proof of title in a third person with which he did not connect himself.³ Under every rational logical system of pleading the defendant must, under a general denial, be permitted to controvert by evidence everything which the plaintiff is bound in the first instance to prove to make out his cause of action.⁴

§ 3. Failure to deny—Effect of.—When the complaint states a clear cause of action and there is no sufficient denial set up in the answer, the plaintiff is not required to prove anything, nor the defendant at liberty either to deny the existence of the facts constituting the cause of action or to prove any state of facts inconsistent with such admission.⁵

¹McGoldrick v. Willits, 52 N. Y. 560; 20 N. Y. State Rep. 120; Griffin 612; Southwick v. First Nat. Bank, 101 N. Y. 350.
²84 id. 420; Cowing v. Altman, 79 id. 167; Knapp v. Simon, 96 id. 284.

³Monk's Van Santvoord's Pl. 568; Morowske v. Rohrig, 53 N. Y. State Rep. 220 (June, 1893).
⁴Robinson v. Frost, 14 Barb. 536; Wimple v. McManus, 39 N. Y. State Rep. 141; Rules of Pleading, 33.

⁵Conner v. Reese, 105 N. Y. 643; Tell v. Beyer, 38 N. Y. 161; Rules of Pleading, 40.

³Seidenbach v. Riley, 111 N. Y.

It is not sufficient to set up an agreement in the answer different from the one stated in the complaint.¹

§ 4. Promise to pay note after dishonor — Proof of protest.— Under a complaint against an indorser of a promissory note alleging a demand, non-payment and notice of dishonor, the plaintiff can show a promise to pay by the indorser after maturity of the note and with full knowledge of real or alleged laches on the part of the holder on giving notice of dishonor. It is elementary law that, as a general rule, in order to charge the indorser of a promissory note, it is necessary to allege and prove presentment of the note at maturity, and due notice to the indorser of its non-payment. There are, however, cases in which it is not necessary to give notice of dishonor to an indorser, and in such case it is not necessary either to allege or prove such notice; for instance, where the indorser before maturity has waived notice, or where he has taken an assignment of the maker's property, or in which other circumstances exist which excuse notice. In all such cases the complaint must contain a statement of the facts, and, as notice cannot be alleged, it is necessary to allege the reasons why notice was not given, and the facts relied upon to excuse such notice. But an unconditional promise to pay a bill or note, made by the indorser after dishonor and with full knowledge of real or alleged laches, is admissible as legal evidence of due presentment and notice. What the pleader is called upon to allege in the complaint are the substantive facts constituting the cause of action, and not the evidential facts from which the existence of the substantive facts are to be inferred.²

§ 5. Under plea of a statute.— An exception in a statute must be negatived in pleading, while a proviso need not; and this, it is said, is on the ground that an exception by proviso is matter of defense that a party must show to relieve him from liability.³ Where an exception is incorporated in the body of the clause of the statute, he who pleads the clause ought to plead the exception. But where there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he may plead the clause and leave it to

¹ *Paige v. Willet*, 38 N. Y. 28; ² *Clark v. Tryon*, 53 N. Y. State Fleischman et al. v. Stern, 90 id. 114. Rep. 123 (June, 1893).

³ *Spiers v. Parker*, 1 Term Rep. 141.

his adversary to show the proviso.¹ When the offense is brought within the enacting clause, and the justification comes in by way of proviso or exception in the first case, it is matter of defense to be shown by the defendant; in the other case the exception must be negatived.² When it is needful for a party to allege a fact, it is upon him to prove it. Where one party charges another with omission or breach of duty, he who makes the charge must prove it, though it involves a negative. There is an exception to this, when the subject-matter of the negative and the means of proof thereof are peculiarly within the knowledge and power of him who claims to be within it; as in the case of a violation of the excise laws, he who by license to sell strong drinks is excepted from the prohibition of these laws must show his license, as he, more than any other, knows that he has it, and has it at his hand in duly authenticated form.³

§ 6. **Defense.**— Under the general issue may be proved anything which goes to show that plaintiff never had a cause of action, by negating any matter of fact alleged or necessary to be proved by plaintiff.⁴ Facts proven do not avail as a counter-claim or set-off unless pleaded. If the facts constituting a counter-claim are alleged, they may be proved; and if proved, the pleader's use of the term recoupment, or set-off, does not prevent the court from giving affirmative judgment.⁵

§ 7. **Res adjudicata.**— A former recovery in favor of plaintiff, relied upon, not as furnishing evidence in support of defendant's present allegations, but as merging the cause of action and constituting a bar to a new action, is not admissible if not pleaded.⁶ Where a former adjudication is pleaded as an estoppel, it is a conclusive bar; and where from the form of the proceedings a party could not plead it, it is admissible and conclusive.⁷

§ 8. **Limitations.**— The statute of limitation is not available to defendant unless pleaded, even though the plaintiff

¹ Jones v. Axen, 1 Ld. Raym. 119. Star F. Ins. Co. v. Palmer, 41 N. Y.

² King v. Bryan, 2 Str. 1101. Supr. Ct. 267.

³ Potter v. Deyo, 19 Wend. 361; ⁶ Rules of Pleading, 37; Brazill v. Harris v. White, 81 N. Y. 532. Isham, 12 N. Y. 9.

⁴ Rules of Pleading, 35.

⁷ Wood v. Jackson, 8 Wend. 9;

⁵ Bates v. Rosekrans, 37 N. Y. 409; Krekeler v. Ritter, 62 N. Y. 372.

shows a case to which the statute appears to be a bar. But plaintiff may rely on the statute, though not pleaded, to bar any demand proved by defendant which did not call for a reply.¹

§ 9. **Discharge from debts.**—A discharge in bankruptcy or insolvency is not admissible in evidence unless pleaded.² But unless a reply is required, the facts relied on to avoid a discharge may be proved in rebuttal though not alleged.³

§ 10. **Release.**—To make a release admissible in evidence it should be pleaded.⁴ So tender cannot be proved, where keeping the tender good and paying it into court are necessary, unless those acts are alleged.⁵

§ 11. **Matter of inducement — Libel and slander.**—Matter alleged by way of inducement, if not material to the cause of action, is not in issue, and is not admitted by failure to deny; nor need it be proved; but if material it is admitted.⁶ Thus, in an action for slander or libel, plaintiff's vocation or official character need not be proved, even though alleged, if the words are actionable apart from that; but it may be proved, even though not alleged, if the words directly tend to injure him in it.⁷ If the actionableness of the words depends upon injury in vocation, and the vocation is in issue, plaintiff must prove that he was in the vocation alleged at the time.⁸ Although plaintiff's allegations set forth the words of the alleged slander, he need not prove the utterance of those precise words, nor necessarily all of them, even in substance, but he must prove the utterance of substantially the words alleged, or of a sufficient part of them to sustain an action.⁹

§ 12. **Special damage.**—Special damage must be specially alleged in order to be proved.¹⁰ The allegation of knowledge of falsity is material.¹¹

¹ Rules of Pleading, 23; Mann v. Palmer, 3 Abb. Ct. App. Dec. 162; Kaiser v. Kaiser, 16 Hun, 602. But see Rules of Pleading, 35, 36.

² Bump on Bankruptcy, 748; Hayes v. Ford, 55 Ind. 52; Cornell v. Dakin, 38 N. Y. 253.

³ Ruckman v. Cowell, 1 N. Y. 505.

⁴ Rules of Pleading, 20; Hitchcock v. Carpenter, 9 Johns. 344.

⁵ Becker v. Boon, 61 N. Y. 317.

⁶ Rules of Pleading, 47.

⁷ Sanderson v. Caldwell, 45 N. Y. 398.

⁸ Forward v. Adams, 7 Wend. 204.

⁹ Smith v. Hollister, 32 Vt. 695; Rules of Pleading, 109–111.

¹⁰ Rules of Pleading, 96, 97; Backus v. Richardson, 5 Johns. 476.

¹¹ Spooner v. Keeler, 51 N. Y. 527.

§ 13. **Trespass.**—In trespass, the allegation of unlawful entry on the premises, and of unlawful removal or injury of property there, are to be distinguished, and an allegation of one of these facts will not admit evidence of the other. If both are alleged, taking issue as to one only admits the other; but if both are in issue, failure to prove either is a variance.¹ Plaintiff may prove a trespass on any part of close alleged,² and, under a denial, the defendant's evidence in disproof of trespass need only be directed to the part of the close to which plaintiff's evidence of trespass was directed. Justification is not admissible under a general denial except by a public officer or one acting under statute.³ Justification by proof of ownership in a third person cannot be proved unless the answer not only alleges such property in the third person, but also connects defendant with such owner by averring that the act was by his authority.⁴

§ 14. **Negligence.**—In an action for negligence, under an allegation of negligence, a contract may be proved, together with actionable negligence, to plaintiff's injury, in the act constituting a breach. And under a general allegation of negligence the circumstances constituting it may be proved.⁵ But evidence of other specific instances of negligence on the part of the defendant, independent of the negligence in question, is not competent.⁶ In an action against a common carrier, a contract, if alleged as a foundation of the action, must be proved, and negligence not alleged may also be proved.

§ 15. **Composition — Payment — Infancy, etc.**—A composition with creditors must be alleged in order to be admissible as a bar.⁷ So an account stated should be pleaded,⁸ and the defense of accord and satisfaction ought to be pleaded.⁹ Payment is another defense that is not, as a general rule, admissible in evidence unless pleaded.¹⁰ Unsoundness of mind must

¹ Rules of Pleading, 63; Colton v. Jones, 7 Robt. 164; Kenny v. Planer, 3 Daly, 131.

² Rich v. Rich, 16 Wend. 663.

³ Root v. Chandler, 10 Wend. 110.

⁴ Rules of Pleading, 38, 39; Kissam v. Roberts, 6 Bosw. 154.

⁵ Rules of Pleading, 95, 96; Oldfield v. N. Y. & H. R. R. Co., 14 N. Y.

⁶ First National Bank of Lyons v. Ocean Nat. Bank, 60 N. Y. 278.

⁷ Smith v. Owens, 21 Cal. 11.

⁸ Kock v. Bonitz, 4 Daly, 117.

⁹ Brett v. First Univ. Soc., 63 Barb. 610.

¹⁰ Rules of Pleading, 20; McKyring v. Bull, 16 N. Y. 297; Quinn v. Lloyd, 41 id. 349.

be pleaded to admit evidence of it.¹ Infancy, to be admissible, must be pleaded.² A new promise is admissible in rebuttal though not alleged.³

§ 16. **Illegality.**—Illegality of contract must be pleaded, to be admissible;⁴ so if the special ground is stated, other grounds not stated are inadmissible.⁵ Thus, to be admissible, usury must be specially pleaded;⁶ and a general allegation, without stating the facts relied on as constituting usury, is not enough, and, if a foreign law is relied on, both the law and the facts necessary to bring the contract under such foreign law must be alleged.⁷ The pendency of another action, to be admissible, must be pleaded, unless it appears on the face of the complaint.⁸

§ 17. **Performance.**—An allegation of performance of a condition does not admit evidence of a waiver or other excuse for non-performance.⁹ An ouster or adverse possession relied on by a defendant, should be pleaded, unless it appears in the complaint.

§ 18. **Warranty of title.**—Failure of title without eviction or disturbance of possession in case of a purchase-money mortgage is not a defense, unless fraud or misrepresentation is proved, and to be admissible these must be alleged.¹⁰

§ 19. **Ownership.**—In replevin ownership may be proved under a general allegation, designating the things as the "goods of the plaintiff."¹¹ A fraud by which defendant obtained the goods from plaintiff may be proved though not alleged.¹² So demand may be proved though not alleged. Under an allegation of conversion of plaintiff's property, evidence of conversion of the property of another, and a subsequent assignment of the property, or of the cause of action

¹ Dearmond v. Dearmond, 12 Ind. 455.

² Walling v. Toll, 9 Johns. 141.

³ Esselstyn v. Weeks, 12 N. Y. 635; Dusenbury v. Hoyt, 53 id. 521.

⁴ Rosc. N. P. 346.

⁵ Dingeldein v. Third Ave. R. Co., 9 Bosw. 79; Rules of Pleading, 20.

⁶ Mechanics' Bank v. Foster, 29 How. Pr. 408.

⁷ Rules of Pleading, 22; Manning

v. Tyler, 21 N. Y. 567; Cutler v. Wright, 22 id. 472.

⁸ White v. Talmadge, 35 N. Y. Supr. Ct. 223; Rules of Pleading, 1-4.

⁹ Rules of Pleading, 51, 52; Oakley v. Morton, 11 N. Y. 25.

¹⁰ Farnham v. Hotchkiss, 2 Abb. Ct. App. Dec. 93.

¹¹ Rules of Pleading, 50, 51; Simmons v. Lyons, 55 N. Y. 671.

¹² Bliss v. Cottle, 32 Barb. 322.

for conversion, is not competent. The assignment must be alleged.¹ Under a general averment of title or ownership the source of plaintiff's title may be proved.² Conversion of checks or money may be proved under an allegation of conversion of property.³ So conversion may be proved under an allegation that defendant took and carried away. Demand before suit if necessary may be proved though not alleged.⁴

§ 20. General denial — Value.—Some value must be proved though the allegation of value is not denied. Under a general denial defendant may show anything going to controvert the facts which plaintiff is bound to establish or to reduce the damages.⁵ Illegality in the contract set up by defendant as a justification of his detention may be proved by plaintiff in rebuttal, though not alleged in pleading, unless the contract is pleaded as a counter-claim.⁶

§ 21. Fraud.—In actions for fraud the fraudulent representations relied on must be stated in the complaint. But, if a sufficient fraudulent representation is duly alleged and proved, a representation not specifically alleged may also be proved.⁷ The plaintiff should allege that defendant knew the facts alleged to be false when he made them.⁸ Intent to deceive must also be alleged,⁹ and that plaintiff relied upon the statements.¹⁰ Plaintiff's knowledge of the facts is admissible under a general denial.¹¹

§ 22. Contract with a common carrier.—In an action against a common carrier of goods, a contract, if alleged as the foundation of the action, must be proved, and negligence not alleged may also be proved.¹² Omission to allege special exemption in the contract is not material unless there is evidence to bring the case within an exemption. An allegation of conversion does not admit of evidence of mere loss, non-delivery or delayed delivery.¹³

¹ Rules of Pleading, 51; Hicks v. ins v. Manhattan Oil Co., 65 N. Y. Cleveland, 48 N. Y. 84; Sherman v. 557.
Elder, 24 id. 381.

² Heine v. Anderson, 2 Duer, 318.

³ Knapp v. Roche, 37 N. Y. Supr. Ct. 395.

⁴ Simser v. Cowan, 56 Barb. 395.

⁵ Booth v. Powers, 56 N. Y. 22.

⁶ Williams v. Tilt, 36 N. Y. 319.

⁷ Rules of Pleading, 61, 76; Calk-

⁸ Oberlander v. Spiess, 45 N. Y. 175.

⁹ Lefler v. Field, 52 N. Y. 621.

¹⁰ Taylor v. Guest, 58 N. Y. 262.

¹¹ Howell v. Biddlecom, 62 Barb. 131.

¹² Bostwick v. Baltimore, etc. R. Co., 45 N. Y. 712.

¹³ Briggs v. N. Y. C. R. Co., 28 Barb.

515.

§ 23. **Actions on judgments.**—In an action upon a judgment any ground which would sustain a bill in equity for relief may be proved under a proper answer in defense of the action.¹ Reversal may be proved under a general denial.² A *vacatur* should be specially pleaded, so a denial of the existence of the judgment does not admit evidence in contradiction of the record that it was without jurisdiction.³

§ 24. **Eviction.**—In actions on leases, under an allegation of wrongful eviction by the landlord as a defense to claim for rent, a constructive eviction may be proved.⁴ Under an allegation that defendant is an assignee of the whole premises, proof that he was assignee of part only is admissible.⁵ A written contract is admissible in evidence under a general allegation that the party contracted, without indicating how.⁶ In an action upon a sealed instrument, plaintiff is not entitled to prove breach not alleged, unless there is a general allegation.⁷ A failure of consideration cannot be proved under a general denial.⁸ In an action on a bond for the payment of money the defendant must plead payment and prove it.⁹ In an action for the breach of any other condition, plaintiff should allege non-performance of the condition and give some proof of non-performance.¹⁰ But if there is a proviso or defeasance contained in a condition, the facts necessary to invoke it must be set up by defendant in order to avail him.¹¹ Special matter of defense, including fraud and mistake, must be pleaded or it cannot be proved.¹² In an action upon an award, a denial of award admits evidence that there was none in fact; but if there was one in fact, there should be an allegation of the irregularity, departure from submission, subsequent *vacatur*, or other ground of invalidity relied on, to admit evidence of the objection.¹³

¹ *Mandeville v. Reynolds*, 68 N. Y. 528; *Crim v. Handley*, 94 U. S. 652.

² *Briggs v. Bowen*, 60 N. Y. 454.

³ *Hill v. Mendenhall*, 21 Wall. 453.

⁴ *Dyett v. Pendleton*, 8 Cow. 727.

⁵ *Van Rensselaer v. Gallup*, 5 Den. 454.

⁶ *Marston v. Swett*, 66 N. Y. 206; *Rules of Pleading*, 63, 64, 65.

⁷ *Briggs v. Vanderbilt*, 19 Barb. 222.

⁸ *Dubois v. Hermance*, 56 N. Y. 673.

⁹ *Rules of Pleading*, 20.

¹⁰ *Lipe v. Becker*, 1 Den. 568.

¹¹ *Jarvis v. Sewall*, 40 Barb. 449.

¹² *Rules of Pleading*, 21, 22; *Northrup v. Miss. Valley Ins. Co.*, 47 Mo. 435; *Maier v. Hibernia Ins. Co.*, 67 N. Y. 283.

¹³ *Day v. Hammond*, 57 N. Y. 484; *Knowlton v. Mickles*, 29 Barb. 465; *Rules of Pleading*, 24, 25.

§ 25. **Negotiable paper.**— In actions upon negotiable paper the loss or destruction of the paper need not be alleged in the complaint.¹ If the action is on the instrument in its original form, a material alteration raises a question of failure of proof or variance. If the action is on the instrument in its altered form, an answer admitting execution, without alleging the alteration, precludes evidence of alteration.² But, under a general denial, evidence that an alteration was made after delivery is admissible.³ Evidence of presentment at the place specified is admissible under a general allegation that the note or bill was duly presented.⁴ An allegation of demand and notice of dishonor is essential, and its omission is not dispensed with by giving a copy of the instrument and alleging the sum due and performance of conditions.⁵ Under an allegation of demand and notice the fact must be proved, and an excuse for failing to demand or to give notice is not admissible.⁶ But indirect evidence, such as a subsequent promise to pay, or an actual part payment, or an admission of liability, is admissible.⁷ Evidence that the paper was made for a special purpose and misappropriated is not available under a mere denial of making or indorsing.⁸ If the complaint makes only a general allegation of title, evidence that title is in another is not admissible as a defense, unless pleaded as new matter.⁹ If the plaintiff's title is not put in issue, evidence that he had none, and had not authorized the action, is inadmissible. But, under a general denial, defendant may show that plaintiff has but a naked legal title, and that the real interest is in another, for the purpose of showing the declarations of that other.¹⁰ Unreasonable delay in the presentment of a check, if relied upon as a defense, must be averred in the answer.

§ 26. **Work and materials.**— In an action for compensation by a person employed, and a general allegation for work and

¹ Freeman v. Ellison, 18 Alb. L. J. 210; 37 Mich. 459.

² Smedberg v. Whittlesey, 3 Sandf. Ch. 320.

³ Rules of Pleading, 84-87; Boomer v. Koon, 6 Hun, 645.

⁴ Rosc. N. P. 369.

⁵ Rules of Pleading, 86; Conklin v. Gandall, 1 Abb. Ct. App. Dec. 423.

⁶ Pier v. Heinrichoffen, 52 Mo. 333; Garvey v. Fowler, 6 Luer, 587; Rosc. N. P. 377.

⁷ Patterson v. Stettauer, 40 N. Y. Supr. Ct. 54.

⁸ Collins v. Gilbert, 94 U. S. 757.

⁹ Rules of Pleading, 27.

¹⁰ Davis v. Carpenter, 12 How. Pr. 287.

labor, plaintiff may give evidence of a particular kind of service and of materials;¹ thus, a claim for articles made and delivered for a specified sum, pursuant to agreement, may be recovered on a complaint for work, labor and materials, as well as on a complaint for goods sold.² But under a general complaint for a *quantum meruit* for work, labor and services, plaintiff cannot prove a contract which remains executory on his part.³ He may, however, under such a complaint, prove that a price was fixed by agreement;⁴ or may give in evidence any express or special contract payable presently in money, together with evidence either of full performance on his part or an excuse exonerating him from full performance;⁵ or that he has in good faith fulfilled, but not in the manner or within the time prescribed by the contract, or that the other party has sanctioned or accepted the work. Under an allegation of a special contract for work and materials, a contract for work only may be proved.⁶ If the allegation be of services between specified dates, prior or later services are not provable; but if the allegation is of indebtedness on a day named, or services before a day named, a term of service or various services before that day may be proved.⁷ Under an allegation of a contract to pay a specified price or rate of compensation, plaintiff may prove a promise to pay what the services were reasonably worth.⁸ But if he rests his case on a contract fixing the price to be recovered, it is not competent for him to give evidence of value as a basis of recovery beyond the contract.⁹

Evidence of an excuse for partial non-performance is objectionable under an allegation of performance.¹⁰

Under a general denial defendant may prove any circumstance tending to show that he was never indebted at all, or that he never owed so much as was claimed: for example, that he never incurred the debt; or that the services, either

¹ Rules of Pleading, 53; 2 Rosc. N. P. 555.

² Rules of Pleading, 51-53; Prince v. Down, 2 E. D. Smith, 525.

³ Dermott v. Jones, 2 Wall. 9.

⁴ Fells v. Vestvali, 2 Keyes, 152.

⁵ Rules of Pleading, 51-53; Hosley v. Black, 28 N. Y. 438.

⁶ Cobb v. West, 4 Duer, 38.

⁷ Rules of Pleading, 51-54; Beekman v. Platner, 15 Barb. 550.

⁸ Scott v. Lilienthal, 9 Bosw. 224.

⁹ Trimble v. Stilwell, 4 E. D. Smith, 512.

¹⁰ Rules of Pleading, 52; Hosley v. Black, 28 N. Y. 438.

in whole or in part, were rendered as a gratuity; or that plaintiff had himself fixed a less price for them than he claimed to recover; or that they were rendered upon the credit of some other person than the defendant.¹ If the complaint is on a *quantum meruit*, not for an agreed price, a general denial admits evidence in reduction of the value, such as that the work was unskilfully done, or that defendant had discharged plaintiff or given him notice to stop.² If the complaint is for an agreed price, a general denial does not admit evidence of unworkmanlike manner, nor of negligence or affirmative misconduct, unless the contract as pleaded requires the plaintiff to show performance of its stipulations, in which case a general denial allows evidence to disprove performance.³ If the complaint is general, defendant must aver a special contract, if he relies on it to show that by its terms nothing is due. If the complaint is general for indebtedness, and does not allege a contract, the statute of frauds is available under a general denial;⁴ but where the complaint sets forth a contract and the answer admits it, the statute is not available unless the facts to invoke the statute of frauds are pleaded.

§ 27. **Sales of personal property.**—In actions arising on sales of personal property under a general allegation that defendant is indebted to plaintiff in the sum of, etc., for goods sold and delivered to defendant by plaintiff at a time and place named, on defendant's request, the plaintiff may show that at defendant's request he sold and delivered to him personal property for which he owes the price or value.⁵ If the facts on which the law raises an implied promise to pay are directly stated, an allegation of such promise is not necessary.⁶ Where the plaintiff may waive his right of action for tort and recover on contract, he may prove the facts under a complaint for goods sold and delivered.⁷ The delivery, under an agreement alleged as a sale and delivery, or its equivalent so

¹ Rules of Pleading, 35; Schermerhorn v. Van Allen, 18 Barb. 29.

² Raymond v. Richardson, 4 E. D. Smith, 171.

³ Rules of Pleading, 38, 39.

⁴ Algers v. Johnson, 6 S. C. (T. & C.) 632.

⁵ Rules of Pleading, 53; Allen v. Patterson, 7 N. Y. 476.

⁶ Farron v. Sherwood, 17 N. Y. 227.

⁷ Rules of Pleading, 71.

far as plaintiff's duty is concerned, is essential to the theory of the action.¹ But under an allegation that the sale and delivery was to defendant, evidence of a sale to defendant, and of a delivery to a third person at his request, is not an entire failure of proof, but only a question of variance.² The usual allegation that plaintiff sold and delivered the goods imports that the goods belonged to him.³ If the complaint does not affirmatively indicate that the contract was void under the statute of frauds, and the answer admits the contract, without alleging the facts showing it to be void under the statute, evidence of compliance with the statute is dispensed with by the admission.⁴ Under a general denial, or denial of the making of the contract alleged, evidence is admissible that the goods were delivered under a special contract which was substantially and materially different from that alleged, and was unperformed by plaintiff.⁵ Defendant may also show that in making the contract he acted as agent for another and on his credit, plaintiff knowing of the agency.⁶ If the delivery or acceptance is in issue on the pleadings, evidence that the thing tendered did not correspond with the contract, or that plaintiff could not give title, will be admissible, though not specially pleaded;⁷ but if acceptance is admitted or proved, and a price fixed by contract is relied on by plaintiff, evidence of deficiency in quality is not admissible unless set up in the answer.⁸ If the plaintiff sues on a *quantum meruit*, evidence of deficiency in quality is admissible, if alleged, even though acceptance under a contract fixing the price be proved.⁹ If the defendant sets up a warranty or false representations, either directly or by denying that there was a purchase except upon terms specified in the answer, the burden is on him to prove the defense.¹⁰

Where delivery and payment were to be concurrent acts, an averment that at the time and place fixed plaintiff was ready

¹ Catlin v. Tobias, 26 N. Y. 217.

⁷ Rules of Pleading, 35, 41, 72.

² Rogers v. Verona, 1 Bosw. 417.

⁸ Fetherly v. Burke, 54 N. Y. 646;

³ Phillips v. Bartlett, 9 Bosw. 678.

McCormick v. Sarson, 38 How. Pr.

⁴ Rules of Pleading, 21, 22 and 58; 190.

Duffy v. O'Donovan, 46 N. Y. 223.

⁹ Moffatt v. Sackett, 18 N. Y. 522.

⁵ Manning v. Winter, 7 Hun, 482.

¹⁰ Rules of Pleading, 100, 101.

⁶ Merritt v. Briggs, 57 N. Y. 651.

and willing to deliver is enough.¹ If those allegations are put in issue, plaintiff must show that he had the articles ready for delivery, and that they corresponded with that contracted for, and either that he offered to deliver or that defendant dispensed with delivery. The averment involves the ability of the plaintiff to deliver. Excuse for breach is not admissible under an allegation of performance.² But if the defendant notified his intention to refuse, and forbade the plaintiff to deliver goods ordered to be made, the plaintiff may show this under an allegation of refusal to accept. Under an agreement to deliver at a particular place for payment on delivery, the buyer must allege readiness and willingness to receive and pay at that place, or that so doing was waived or prevented by some act of the seller.³ Under an allegation of defendant's non-delivery, evidence of his tender, properly refused by plaintiff, is admissible.⁴ Warranty, if relied on, must be alleged, even though it is implied by law;⁵ but under an allegation not stating whether the warranty was express or implied, proof of either is admissible and sufficient.⁶ Variance between the allegation and proof in respect to the title to the goods, the consideration of the sale, etc., is of little importance in proving the warranty. Under the allegation of warranty and breach, evidence of defendant's subsequent promise to cure the defect is admissible, and he may be held liable on that promise.⁷

§ 28. **Money had and received.**—In actions for money had and received, the complaint, unless on an account, must usually be special, setting forth the relation of the parties and the contract or wrong by means of which the money was received. If the facts alleged constitute a tort, such as a conversion or deceit in obtaining credit, or a breach of trust, it does not necessarily make the action one of tort.⁸ Where the tort is not alleged, plaintiff may still prove it as part of the transaction by which defendant actually received money which

¹ *Rosc. N. P.* 510.

² *Rules of Pleading*, 33-41.

³ *Clark v. Dales*, 20 *Barb.* 42.

⁴ *Seaman v. Lew*, 5 *Barb.* 337.

⁵ *Rules of Pleading*, 100, 101; *Pren-tice v. Dike*, 6 *Duer*, 220.

⁶ *Hoe v. Sanborn*, 21 *N. Y.* 552.

⁷ *Dennis v. Coman*, 61 *N. Y.* 642.

⁸ *Rules of Pleading*, 70; *Vilmer v. Schall*, 61 *N. Y.* 564.

he ought to refund to plaintiff.¹ Under a general denial the defendant may prove that the contract contained material provisions under which the money was received, other than those alleged, or that there was a departure from the contract by plaintiff's request and the money was paid accordingly.²

§ 29. **Actions against receivers, etc.**—In an action by or against a receiver, an allegation of his due appointment is necessary, if the right of action was vested in him by his appointment. If, on the other hand, the right of action is not derived through his appointment, he need not allege his appointment, but he may sue, simply describing himself as receiver.³ Thus, when a receiver sues on a contract made with him as receiver, he may sue without alleging his appointment.⁴

§ 30. **Partnership actions.**—In an action by partners, an allegation of partnership between plaintiffs is unnecessary in their complaint, unless their right of action depends on the partnership. Where a joint ownership or joint contract will enable them to recover, it is no objection to the complaint that the partnership is not pleaded.⁵ In an action against partners, where a joint liability appears on the face of the contract, a partnership need neither be alleged nor proved;⁶ and the chief effect of alleging and proving a partnership is to open the way for admitting more freely the acts and declarations of one partner against the other.⁷ The omission to join a copartner as a defendant is not available, unless it appears by the pleadings, and an answer alleging a defect in this respect must state precisely and truly who were the parties.⁸ It is not enough to show that the one joined was, in fact, a partner as between defendants, if it is not shown that the fact was generally known, or known to plaintiffs.⁹ The fact that, after the transaction and before suit brought, plaintiff became aware that the omitted person was a part-

¹ Harpending v. Shoemaker, 37 Barb. 270.

² Rules of Pleading, 35; Flynn v. McKeon, 6 Duer, 203.

³ Rules of Pleading, 61 and 105.

⁴ White v. Joy, 13 N. Y. 83.

⁵ Loper v. Welch, 3 Duer, 644.

⁶ Kendall v. Freeman, 2 McLean, 189.

⁷ Rules of Pleading, 149, 150.

⁸ Weigand v. Sichel, 4 Abb. Ct. App. Dec. 592.

⁹ Rules of Pleading, 149, 150; North v. Bloss, 30 N. Y. 380; N. Y. D. D. Co. v. Treadwell, 19 Wend. 525.

ner, is not enough. In an action for an accounting the allegation of partnership is material.¹

§ 31. **Public officers.**—In an action by a public officer in his official capacity, if he is named personally, the pleading must indicate that he sues officially. A mere addition of his title, without anything to indicate that he sues as such officer, is not enough.² But if it appears from the title or the body of the complaint that he complains as officer, a cause of action accruing to him in his official capacity may be proved.³ In an action against a public officer for a wrong not involving the violation of any official duty, he or his predecessor owed to the plaintiff, the cause of action may be proved, although the complaint does not allege that he was such officer.⁴ But where the breach of such a duty is involved, the complaint should designate him as such officer, and aver him to be such. In New York, in every action against a public officer for his official acts, the defendant may give special matter in evidence under the general issue without notice. Where he pleads justification, however, he must do so strictly.⁵

§ 32. **Married women.**—In actions by a married woman on contract, an allegation of her coverture is not necessary in her complaint.⁶ If her complaint does allege coverture the contract will be presumed to have been within her capacity if it may have been so, without allegation of the facts on which her capacity depends. Defendant's denial of the contract does not avail to raise the defense of her coverture when she made it.⁷ But if her coverture is pleaded in defense or in abatement and proved, then she must prove the facts showing her capacity to make the contract or to sue, as the case may require.⁸ Where defendant sets up a contract made by her as a counter-claim against her she must allege coverture, for coverture as a defense, even if proven, is not available unless pleaded;⁹ and the complaint in an action upon a contract executed by a married woman, whether against her alone or her

¹ *Salter v. Ham*, 31 N. Y. 321.

⁶ *Rules of Pleading*, 97; *Hier v.*

² *Rules of Pleading*, 107, 145; *Smith v. Levinas*, 8 N. Y. 472.

Staples, 51 N. Y. 136.

³ *Griggs v. Griggs*, 66 Barb. 291, 300.

⁷ *Westervelt v. Ackley*, 62 N. Y. 505.

⁴ *Curtis v. Fay*, 37 Barb. 64.

⁸ *Borst v. Spelman*, 4 N. Y. 284.

⁵ *Persons v. Parker*, 3 Barb. 249.

⁹ *Westervelt v. Ackley*, 62 N. Y. 505.

husband with her, need not allege her coverture, nor that the contract was executed in her business, or for the benefit of her separate estate, even if it appear by the contract that she was married; but the complaint may be framed as if defendant was a *feme sole*. Her coverture is matter of defense, to be pleaded by defendant if available; and evidence that she was a married woman and could not contract is not admissible under a denial of the contract.¹ The plaintiff may prove the contract as alleged, and rest, unless the defendant has pleaded coverture and the fact appears by plaintiff's case; if so, or if defendant thereupon proves coverture under his answer, the burden is cast upon the plaintiff to prove a case within the statute.²

§ 33. Heirs and next of kin.—In an action against heirs and next of kin on a debt of the ancestor, the plaintiff must allege and prove affirmatively a case within the provisions of the statute which creates the right of action.³ His failure to allege and prove everything which the statute demands is sufficient to prevent a recovery.⁴ He must allege the granting of letters; that his action is brought after three years from the grant of letters; that defendant inherited real property by descent, or acquired real property or personal property under decedent's will or the statute of distribution, and that decedent left no personal property within the state, or that the same was insufficient to pay the debt, or that the debt could not be collected in due proceedings before the proper court, and at law, from the personal representatives of the decedent, nor — if the action is against an heir — from the next of kin or legatees; and the allegations must be in all things proved as laid.⁵

§ 34. Admission in pleading.—An answer may contain a direct or implied admission of some fact alleged in the complaint.⁶ The admission is implied when the fact alleged in the complaint is not denied in the answer. It is direct when the admission is made in terms. Either form of admission of an allegation contained in the complaint is conclusive upon

¹ Rules of Pleading, 33-38.

⁴ Selover v. Coe, 63 N. Y. 443.

² Downing v. O'Brien, 67 Barb. 582.

⁵ Roe v. Swezey, 10 Barb. 251;

³ Mersereau v. Ryerss, 3 N. Y. 261; Armstrong v. Weed, 62 N. Y. 250.

Rules of Pleading, 101.

⁶ Rules of Pleading, 40, 41.

the defendant so long as it remains in the pleading, and the plaintiff can point to it as conclusive proof of the truth of the allegation.¹ No proof can be admitted in support of new matter contained in an answer which is inconsistent with an allegation in the complaint which is not denied.² But an allegation contained in an answer setting up an affirmative defense which has no reference to and does not admit any allegation of the complaint is of an entirely different nature. Such allegation is not an admission contained in a pleading which is conclusive so long as it remains in the record. An admission which so concludes a party admits something already alleged or set forth in the pleading to which the pleading containing the admission is an answer. Thus, in *Ferris v. Hard et al.*,³ it was held that when the complaint alleged the making and delivery of a mortgage by defendants for \$10,000, and the answer of one of the defendants alleged that she executed the mortgage for the purpose of securing the mortgagee for money loaned and to be loaned to her husband, that upon the trial the defendant could show a fact which was inconsistent with her allegation of the consideration, as the allegation as to the consideration of the mortgage admitted nothing as to that consideration which was set forth in the complaint, for there was no allegation therein as to consideration. Either party is always at liberty to show, for any purpose except to prevent its operation as a valid deed or mortgage, that the consideration was different from that named in the instrument.⁴

§ 35. Attacking an instrument set up as a counter-claim. Where, in an action at law upon a money demand, an instrument executed by the plaintiff is set up as a counter-claim, the plaintiff cannot, under a reply simply denying the counter-claim, show by parol evidence what was the true agreement between the parties to such instrument. That is to say, if the instrument set up was complete when the plaintiff signed it, although by fraud or mistake it did not express the true agreement between the parties, his sole remedy is to procure

¹ *Paige v. Willet*, 38 N. Y. 28.

³ 135 N. Y. 358; 48 N. Y. State Rep.

² *Fleischman v. Stern*, 90 N. Y. 110; 518.

Beard v. Tilghman et al., 66 Hun, 12; ⁴ *Murray v. Smith*, 1 Duer, 412.
49 N. Y. State Rep. 508.

its reformation; and when an effort is made to enforce it against him he cannot contradict the terms thereof by parol evidence, except by proper allegations in his pleadings, asking for its reformation. But where the plaintiff signs a blank piece of paper, it is sufficient for him on the trial to prove that he simply signed a blank piece of paper, and then it is for the defendant to show that the plaintiff authorized the blank to be filled up, and how and under what circumstances the authority was given and what the authority was.¹

§ 36. **Proof of defenses arising after suit brought.**—In an equitable action, matters occurring after the suit commenced, but before answer, may be pleaded as of right; and the reason is that in such action costs are discretionary, and if the defendant prevails, notwithstanding there was good cause to sue, the court can charge him with costs. But in an action of a legal nature, the right of the parties must be determined as they existed at the commencement of the action, except so far as the situation has been since changed unfavorably to the plaintiff's claim, either by his own act or by operation of the law, the reason being that, in a legal action, the statute gives costs; and as they ought not to be charged on a plaintiff who had good ground to sue, defendant should get leave to plead, so that the court may impose terms.² Evidence of such facts cannot be given unless pleaded.³

§ 37. **Explaining inconsistencies between testimony and pleading.**—Where there is a clear contradiction between the evidence and a sworn answer, the defendant may give any evidence which tends, if believed, to explain such contradiction in a manner consistent with the honesty of the witness. Thus, in *Ferris v. Hard et al.*,⁴ the defendant was allowed to show that when the answer was drawn she informed the attorney that the facts were as sworn to by her, and the attorney advised her there was no legal difference between her statement and the allegations in the answer, as that was the legal effect, etc.

¹ *Richards v. Day*, 137 N. Y. 183; 50 N. Y. State Rep. 389.

² *Styles v. Fuller*, 101 N. Y. 622.

³ *Ferris v. Tannebaum*, 39 N. Y. State Rep. 71.

⁴ 135 N. Y. 354; 48 N. Y. State Rep. 518.

CHAPTER IV.

EVIDENCE EXCLUDED FROM PUBLIC POLICY.

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| <p>I. PRIVILEGE OF WITNESSES.</p> <p>§ 1. In general.</p> <p>2. Criminating answers.</p> <p>3. Cross-examination of a defendant when he offers himself as a witness in a criminal case.</p> <p>4. Questions tending to degrade a witness.</p> <p>5. Judges.</p> <p>II. BETWEEN COUNSEL AND CLIENT.</p> <p>6. In general.</p> <p>7. What communications come within the rule.</p> <p>8. Extent of the protection.</p> <p>9. Opinion of counsel protected when.</p> <p>10. Documents and papers protected.</p> <p>11. When the attorney is also a party.</p> | <p>§ 12. Protection perpetual when.</p> <p>13. What communications are not privileged.</p> <p>III. PHYSICIANS AND PATIENTS.</p> <p>14. In general.</p> <p>15. When physician prohibited from testifying.</p> <p>16. Waiver by patients.</p> <p>17. Clergymen.</p> <p>IV. STATE SECRETS.</p> <p>18. In general.</p> <p>19. State officials.</p> <p>20. Grand jurors.</p> <p>V. HUSBAND AND WIFE</p> <p>21. In general.</p> <p>22. Marriage — Proof of, necessary.</p> <p>23. Illustrations.</p> <p>24. Personal privileges.</p> <p>25. Offer to settle or compromise.</p> |
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I. PRIVILEGE OF WITNESSES.

§ 1. In general.—There is a great difference between privilege and incompetency, though the difference has not always been kept in view. An incompetent witness cannot be examined, and, if examined inadvertently, his testimony is not legal evidence; but a privileged witness may always be examined, and his testimony is perfectly legal if the privilege is not insisted on. The privilege of the witness arises in three ways: First, on the ground that to answer the question would expose him to consequences so injurious that he ought to be allowed to decline doing so; secondly, that to answer the question would be a breach of confidence, which he ought not to be forced to commit; thirdly, that to compel the witness to answer the question would be against public policy. Thus there

are some kinds of evidence which the law excludes or dispenses with on grounds of public policy, because greater mischief would probably result from requiring or permitting its admission than from wholly rejecting it.

§ 2. **Criminating answers.**—That the witness will be subject to a criminal charge, however punishable, is clearly a sufficient ground for claiming the protection.¹ It is proper to ask a question the answer to which may criminate the witness, as he may answer it, and the court will carefully instruct the jury that the refusal to answer gives rise to no inference of guilt;² of course the judge is to decide whether or not the witness is entitled to the privilege. But the witness and not the court is the proper judge whether a question put to him has a tendency to criminate.³ The court will instruct him to enable him to determine, and if the answer forms one link in a chain of testimony against him he is not bound to answer. It is the province of the court to judge whether any direct answer to the questions which may be proposed will furnish evidence against the prisoner. In such a case the witness must himself judge what his answer will be, and if he say on oath he cannot answer without accusing himself, he cannot be compelled to answer.⁴ If a witness is exempt by statute from liability for any offense of which he is compelled to give evidence, or if the offense, as to him, is barred by the statute of limitations, he cannot claim the privilege of not answering ordinarily incident to such case;⁵ and if a statute provides that what a witness testifies shall not be given in evidence against him, his privilege is gone.⁶ The rule that a witness is not obliged to criminate himself is well established, but this is a privilege which may be waived; and if the witness consents to testify in one matter tending to criminate himself, he must testify in all respects relating to the matter so far as material to the issue. If he waives the privilege, he does so

¹ *People v. Kelly*, 10 Smith, 74; *Pleasant v. State*, 15 Ark. 624; *Lowe v. Mitchell*, 18 Me. 372; *United States v. Craig*, 4 Wash. C. C. 229; *People v. Herrick*, 13 Johns. 82; *Ward v. People*, 3 Hill, 395; *Warner v. Lucas*, 10 Ohio, 336.

³ *State v. Edwards*, 2 Nott & McC. 13.

⁴ 1 *Burr's Trial*, 245; *Kirschner v. State*, 9 Wis. 140.

⁵ *Floyd v. State*, 7 Tex. 215.

⁶ *People v. Kelly*, 10 Smith, 74; *State v. Quailes*, 8 Eng. 307.

² *Newcomb v. State*, 37 Miss. 383.

fully in relation to that act, but he does not thereby waive his privilege of refusing to reveal other unlawful acts, wholly unconnected with the act of which he has spoken, even though they may be material to the issue;¹ and if the witness understandingly waives his privilege and begins to testify, he must submit to a full cross-examination if required; that is to say, if a witness, knowing that he is not bound to testify concerning a fact which may tend to criminate, voluntarily answers in part, he may be cross-examined as to the whole transaction.² It is the privilege of the witness, not of the party, that the witness need not testify to facts which will subject him to a criminal prosecution. If he waives his privilege and testifies to part of the transaction in which he was criminally concerned, he is bound to state the whole.³

§ 3. Cross-examination of a defendant when he offers himself as a witness in a criminal case.—The discretion which courts possess to permit questions of particular acts to be put to witnesses for the purpose of impairing credibility should be exercised with great caution when an accused person is a witness on his own trial. He goes upon the stand under a cloud; he stands charged with a criminal offense not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust, and if, in addition to this, he may be subjected to a cross-examination upon every incident of his life and every charge of crime or vice which may have been made against him, and which have no bearing on the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict upon evidence which otherwise would be deemed insufficient. It is not legitimate to bolster up a weak case by probabilities based upon other transactions. An accused person is required to meet the specific charge made against him, and is not called upon to defend himself against every act of his life. Neither in *People v. Brandon*,⁴ nor in *People v. Connors*,⁵ was the point of relevancy upon the question of credibility presented. In

¹ *Lowe v. Mitchell*, 18 Me. 372.

³ *State v. Foster*, 3 Foster, 348.

² *Foster v. Pierce*, 11 Cush. 437;

⁴ 42 N. Y. 265.

People v. Carroll, 3 Park. Cr. Rep. 73.

⁵ 50 N. Y. 240.

each case the ground of the objection was specific, and did not involve that point.¹

Mr. Greenleaf, in his work on Evidence, lays down the rule that questions, the answers to which, though they may disgrace the witness in other respects, will not affect the credit due to his testimony, are clearly impertinent and not allowable; and even as to questions which do not tend to discredit him as a witness, although sometimes allowed at *nisi prius*, he regards the rule as unsettled. He says: "The great question, however, whether a witness may not be bound in some cases to answer an interrogatory to his own moral degradation, when, though it is collateral to the main issue, it is relevant to his character for veracity, has not yet been brought into direct and solemn judgment, and must therefore be regarded as an open question, notwithstanding the practice of eminent judges at *nisi prius* in favor of the inquiry under the limitations we have above stated." To allow them at all was a departure from the old rule. Lord Eldon said: "It used to be said that a witness could not be called on to discredit himself, but there seems to be something like a departure from that—I mean that in modern times the courts have permitted questions to show from transactions not in issue that the witness is of impeached character and therefore not so credible."²

Mr. Phillips, in his work on Evidence, gives the reasons for and against allowing questions collateral to the issue when they affect credibility. The reasons in favor are that without allowing them there would be no adequate means of ascertaining what credit is due to the testimony of a witness, and that is especially necessary in the case of spies, informers and accomplices, in order to prevent property, or even life, to be endangered by the unexpected appearance of a strange witness.³ This reasoning has no application to the case of an accused person who appears as a witness. The prosecution can never be taken by surprise either as to his being a witness or his character. The reasoning against this kind of evidence is far more logical and satisfactory. Mr. Phillips states it

¹ *People v. Brown*, 72 N. Y. 571.

³ 2 Phil. on Ev. 943 (5th Am. ed.).

² *Parkhurst v. Lowten*; 2 Swans.

substantially as follows: That the obligation of an oath only binds to speak touching the matters in issue; that such particular matters as whether the party has been in jail for felony, or suffered infamous punishment, or the like, are not a part of the issue, because other witnesses could not be called to prove them; that it would be an extreme grievance to a witness to be compelled to disclose past transactions of his life which may have been since forgotten, and to expose his character afresh to evil report; that if a witness is privileged from answering a question which is relevant to the issue because it may tend to the forfeiture of property, with much more reason ought he to be excused from answering an irrelevant question to the disparagement and forfeiture of his character; that in the case of accomplices an exception to a certain extent might be made on account of their peculiar situation, etc.¹ While the practice has obtained to some extent of allowing questions to a witness the answers to which would tend to impeach his credibility, the courts have uniformly excluded questions which do not clearly have that effect. In *People v. Genung*² the question put to the prosecutor, whether he had not frequently during the session of the court offered to the prisoner that if he would settle the subject-matter of the indictment he would leave the court and not appear as a witness, was held incompetent because it did not impair credibility. In *People v. Gay*³ Jewett, J., said: "The single fact that he (the witness) had been complained of and held for trial for the commission of a crime did not affect his moral character." This was upon the ground that the witness was presumed innocent until convicted. No rule of law is violated in requiring that, to entitle questions to be put to accused persons which are irrelevant to the issue and are calculated to prejudice him with the jury, they should at least be of a character which clearly go to impeach his general moral character and his credibility as a witness. The old rule, not to allow irrelevant questions to such persons, would be preferable and more in accordance with sound principles of justice; but it is unnecessary to go beyond the requirement that the answer must tend directly to impeach him. In *People v.*

¹ 2 Phil. on Ev. 943 (5th Am. ed.).

³ 7 N. Y. 378.

² 11 Wend. 19.

Crapo¹ the prisoner was on trial for burglary and larceny, and, having taken the stand as a witness in his own behalf, was asked on cross-examination if he had been arrested on a charge of bigamy. The court held the question inadmissible, and stated the rule to be that the disparaging questions must either be relevant to the issue or such as clearly go to impeach the moral character and credibility of the witness. In *People v. Brown*² the question asked the party testifying in his own behalf was how many times he had been arrested, and it was held inadmissible. In *Ryan v. People*³ the witnesses were asked if they had been indicted. This was held to be inadmissible. In *People ex rel. Phelps v. Oyer & Term., etc.*,⁴ the court say: Their control over questions put to a party as a witness in a criminal case was not absolute, and that, as a general rule, the range and extent of such an examination is within the discretion of the trial judge, subject, however, to the limitation that it must relate to matters pertinent to the issue, or to specific facts which tend to discredit the witness or impeach his moral character; and to the same effect was *People v. Casey*.⁵ In *People v. Noelke*⁶ it was held proper to ask a defendant examined as a witness in his own behalf whether he had been tried and convicted of violating the law, etc.

§ 4. Questions tending to degrade a witness.— Every question must be answered by a witness, whether it tend to degrade him or not, if it be material to the issue, unless it tend to render him liable to penalties and punishment. As the credibility of a witness is always in issue, he must therefore answer questions which are in no other way material than as affecting his credibility. On the other hand, every question which is not material to the issue is improper; and it is not only improper, but unbecoming, to put questions to a witness the very putting of which tends to degrade him, and which, not being material, he cannot be compelled to answer. And as every witness is entitled to the protection of the court in which he appears, any attempt to degrade him unnecessarily will immediately be repressed without waiting for the witness

¹ 76 N. Y. 288.

² 72 N. Y. 571.

³ 79 N. Y. 594.

⁴ 83 N. Y. 460.

⁵ 72 N. Y. 393.

⁶ 94 N. Y. 137.

to object to the question. A witness is not bound to give answers which may stigmatize or disgrace him.¹ A witness is not bound to answer any questions which may impeach his conduct as a public officer.²

§ 5. **Judges.**—Judges and justices of the peace cannot be asked to disclose anything that transpired at their consultations, but may be examined to identify a case or establish facts which do not appear from the record of a case, or to prove the testimony of a witness.³

II. BETWEEN COUNSEL AND CLIENT.

§ 6. **In general.**—If an attorney, touching matters that come within the ordinary scope of professional employment, receive a communication in his professional capacity either from a client, or on his account and for his benefit, in the transaction of his business, or, which amounts to the same thing, if he commits to paper in the course of his employment, on his client's behalf matters which he knows only through his professional relation to the client, he is not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the paper in any court of law or equity, either as party or as witness.⁴ In other words, no legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's consent, to disclose any communication, oral or documentary, made to him as such legal adviser, by or on behalf of his client, during, in the course, and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or otherwise,

¹ *State v. Bailey*, 1 Penn. 415; *Vaughn v. Perine*, 2 id. 628; *Baird v. Cochran*, 4 Serg. & Rawle, 400; *Resp v. Gibbs*, 3 Yeates, 429, 437; *Galbraith v. Eichelberger*, id. 515; *Bell's Case*, 1 Browne, 376; *Saltonstall's Case*, 1 Rogers' Rec. 134; *Stout v. Russell*, 2 Yeates, 334; *People v. Herrick*, 13 Johns. 82.

² *Jackson v. Humphrey*, 1 Johns. 498; *Marbury v. Madison*, 1 Cranch, 144.

³ *Welcome v. Batchelor*, 33 Me. 85; *Jackson v. Humphrey*, 1 Johns. 498; 1 Whart. Ev. 600; *People v. Miller*, 2 Park. Cr. Rep. 197.

⁴ *Stephen's Dig. of Law of Ev.*, art. 115; *Nelson v. Becker*, 32 Neb. 99; *State v. James*, 34 S. C. 49; *Matthews v. Hoagland*, 48 N. J. Eq. 455; *Alexander v. United States*, 138 U. S.

353.

or to disclose any advice given by him to his client during, in the course of, and for the purpose of such employment. It is immaterial whether the client is or is not a party to the action in which the question is put to the legal adviser.¹ And the presumption is that all communications between attorney and client are confidential.²

§ 7. What communications come within the rule.—In order to bring a communication within the protection of the rule it must have been made to the counsel, attorney or solicitor acting for the time being in the character of a legal adviser.³ This protection extends also to all the necessary organs of communication between the attorney and his client; an interpreter, and an agent or clerk, being considered as standing in precisely the same situation as the attorney himself, and under the same obligation of secrecy.⁴ This is a rule of law for the protection of the client; the privilege does not attach if the person consulted be not a member of the profession, although supposed to be so by the client.⁵

§ 8. Extent of the protection.—As between client and attorney, the protection extends to every communication which the client makes to his attorney as his legal adviser, for the purpose of professional advice or aid upon the subject of his rights and liabilities having a lawful object.⁶ But if the purpose contemplated be a violation of law, it is not a privileged communication, because it is not an attorney's duty to contrive fraud.⁷ But any statement made by a party to his legal adviser after the commission of a crime is privileged.⁸ It is not necessary that any judicial proceeding in particular should have been commenced or contemplated; it is enough if the matter in hand may by possibility become the subject of judicial inquiry.⁹

¹ Stephen's Dig. of Law of Ev., art. 115; *Chirac v. Reinecker*, 11 Wheat. 280; *McLennon v. Longfellow*, 32 Me. 494; *Whiting v. Barney*, 30 N. Y. 330; 38 Barb. 393; *Graham v. People*, 63 id. 468.

² *Sharon v. Sharon*, 79 Cal. 633.

³ *Sargeant v. Hampden*, 38 Me. 581.

⁴ *Jackson v. French*, 3 Wend. 337; *Power v. Kent*, 1 Caw. 211; *Sibley v. Waffle*, 16 N. Y. 180.

⁵ *Sample v. Frost*, 10 Iowa, 266; *Barnes v. Harris*, 7 Cush. 576.

⁶ *Russell v. Jackson*, 15 Jur. 1117.

⁷ *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528.

⁸ *State v. James*, 34 S. C. 49; *Alexander v. United States*, 138 U. S. 353.

⁹ *Foster v. Hall*, 12 Pick. 89.

Thus, an attorney in receiving the directions and instructions of one intending to make a will, although he asks no questions and gives no advice, but simply reduces to writing the directions given him, still acts in a professional capacity, and is prohibited from disclosing any communication so made to him by his client.¹ He may, however, testify as to the acts of the testator at its execution tending to support the will which is attacked.² But an attorney who drew and was a witness to a will as counsel for testator cannot testify to professional transactions with the deceased other than the circumstances immediately surrounding the execution of the will upon a contest as to the probate of the will.³ So an attorney who drew a will cannot testify who gave him the instructions to do so unless they were given in the presence of a third person.⁴ And the privilege of professional secrecy is not confined to the knowledge derived by counsel from communications made to him by or in confidence with clients, but extends to information obtained from documents submitted for his inspection or custody.⁵

§ 9. Opinion of counsel protected when.—It seems that a party is not obliged to discover and produce the opinion of counsel, nor can he be made to disclose any communication between himself and his legal adviser which his legal adviser could not disclose without his permission;⁶ but this rule only refers to criminal cases.⁷ Where a party testifies that he was advised by an attorney that he had a right to take the property in question, it is error to allow such attorney to testify as to what counsel or advice he gave.⁸ But asking a witness on cross-examination whether he had ever communicated to his attorney a fact to which he had testified is not a violation of the rule.⁹

¹ *Loder v. Whelpley*, 111 N. Y. 239; 19 N. Y. State Rep. 631.

² *Re McCarthy*, 55 Hun, 7; 28 N. Y. State Rep. 342. But see *Re McCarthy's Will*, 38 id. 124.

³ *Re Bedlow's Will*, 67 Hun, 408; 51 N. Y. State Rep. 782.

⁴ *Re McCarthy's Will*, 48 N. Y. State Rep. 315. But see *Re Gagan's*

Will, 66 Hun, 632; 49 N. Y. State Rep. 366.

⁵ *Matthews v. Hoagland*, 48 N. J. Eq. 455.

⁶ *Swenk v. People*, 20 Ill. App. 111.

⁷ But see *Weinstein v. Reid*, 25 Mo. App. 41.

⁸ *People v. Hillhouse*, 80 Mich. 580.

⁹ *State v. Tall (Minn.)*, 45 N. W. Rep. 449.

§ 10. Documents and papers protected.—An attorney is not bound to produce any paper, document or deed left with him by his client for professional advice; or a letter written him by his client;¹ nor letters which, though not written by his client, will affect his client's interest in an action;² and whether the object of leaving the document with the attorney was for professional advice or for another purpose is for the judge to determine. The attorney may be examined to the fact of the existence of the papers in order to let in secondary evidence of their contents.³ As documents which are not privileged in the hands of a party cannot be made so by placing them in the hands of his counsel,⁴ if the attorney was counseled merely as a conveyancer, to draw papers of conveyance, the communications made to him in that capacity are protected,⁵ even though he was employed as the mutual adviser and counsel of both parties.⁶ But a communication between an attorney and client, when both parties to the action are present, is not a confidential communication so as to be inadmissible.⁷ It is different, however, between either of the parties and third persons.⁸

§ 11. When the attorney is also a party.—Communications of a client to his attorney are not privileged, if the attorney is himself a party to the transaction, or, in other words, if he were acting for himself, though he might also be employed by another. Thus, where an attorney for defendant in proceedings supplementary to execution has testified that he had some property of defendant in his possession, he may be required to state what he had and what he had not done with it.⁹

¹ *Arnold v. Cheesebrough*, 41 Fed. Rep. 74.

² *Re Whitlock*, 51 Hun, 351; 21 N. Y. State Rep. 719.

³ *Jackson v. McVey*, 18 Johns. 330; *Jackson v. Denison*, 4 Wend. 558.

⁴ *Edison Electric Light Co. v. United States Electric Light Co.*, 44 Fed. Rep. 294.

⁵ *Barry v. Coville*, 53 Hun, 620; 25 N. Y. State Rep. 658.

⁶ *Wilson v. Troup*, 7 Johns. Ch. 25.

⁷ *Smith v. Crego*, 54 Hun, 22; 26 N. Y. State Rep. 64; *Denser v. Walkup*, 43 Mo. App. 625; *Dikeman v. Arnold* (Mich.), 44 N. W. Rep. 407.

⁸ *Gruber v. Baker*, 20 Nev. 453.

⁹ *Hardy v. Gleason* (Oreg.), 23 Pac. Rep. 817.

§ 12. Protection perpetual when.—The protection given by law to communications between an attorney and his client does not cease with the termination of the suit or business in which they were made. The seal of the law once fixed upon them remains forever, unless removed by the party himself in whose favor it was placed. It is not affected by the party's ceasing to employ the attorney and retaining another; nor by the death of the client.

§ 13. What communications are not privileged.—Confidential communications do not extend to any fact observed by any legal adviser, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether his attention was directed to such fact by or on behalf of his client or not; nor does it extend to any fact with which such legal adviser became acquainted otherwise than in his character as such. Thus, an attorney may be compelled to disclose the name of the person by whom he was retained;¹ the character in which his client employed him at the time when an instrument was put into his hands; the fact of his paying over to his client moneys collected for him; the execution of a paper by his client; a statement made by him to the adverse party; his client's handwriting; the identity of his client; or the place where an acknowledgment of a paper was taken.² Professional communications are not privileged when they are for an unlawful purpose, having for their object the commission of a crime;³ or when made for the purpose of publication or communication to another.⁴ Where the communication was made before the attorney was employed as such, or after his employment had ceased;⁵ or where, though consulted by a friend because he was an attorney, yet he refused to act as such, and was therefore only applied to as a friend; or where the matter communicated was not in its nature private,—in

¹ Brown v. Payson, 6 N. H. 443.

⁴ Bartlett v. Bunn, 56 Hun, 507;

² Mutual Life Ins. Co. v. Corey, 54 Hun, 493; 27 N. Y. State Rep. 608.

31 N. Y. State Rep. 319; White v. State, 86 Ala. 69.

³ Matthews v. Hoagland, 48 N. J.

Eq. 455; People v. Van Alstine, 57 Mich. 62; Tyler v. Tyler, 126 Ill. 525;

⁵ Theisen v. Dayton, 82 Iowa, 74; Wadd v. Hazleton, 62 Hun, 602; 43 N. Y. State Rep. 686.

9 Amer. State Rep. 642; Everett v. State, 30 Tex. App. 682.

all such cases the attorney is not exempted from disclosing. A plaintiff, by calling his attorney to testify as to communications made by him to the attorney, thereby waives the privileged character of the communications.¹ So he waives such privilege by requesting his attorney to act as subscribing witness to his will.² Communications to a law student, made while he is employed to advise and assist in a law-suit, are not privileged;³ and so communications made by a person to an attorney in ignorance of his professional character and without any purpose of securing his professional aid, or to the clerk of an attorney, but of which fact the one making them ignorant, are not privileged,⁴ as the rule as to the inviolability of professional confidence applies as between attorney and client only to communications made for the purpose of professional action and aid, and the secrecy imposed extends to no other persons than those sustaining confidential relationship;⁵ and if the parties sustaining a confidential relation to each other hold their confidences in the hearing of third persons, whether they be necessarily present as officers or are indifferent bystanders, such third persons are not prohibited from testifying to what they heard.⁶ But in some states such fact does not remove the privilege and make the attorney's testimony concerning them admissible;⁷ while in others the attorney may be called to testify to them.⁸ So communications from the maker of an instrument to a scrivener employed by him to draw it are not privileged within the rule governing relations between attorney and client;⁹ nor are those made to an attorney and abstractor of titles by one who employed him merely to search the title and make the abstract,

¹ *Smith v. Crego*, 54 Hun, 22; 26 N. Y. State Rep. 64.

² *Re Lamb's Will*, 18 N. Y. Supp. 173.

³ *Schubkagel v. Dierstein*, 131 Pa. St. 46.

⁴ *Hawes v. State*, 88 Ala. 37.

⁵ *Cotton v. State*, 87 Ala. 75; *House v. House*, 61 Mich. 69.

⁶ *Cotton v. State*, 87 Ala. 75; *Blount v. Kimpton*, 155 Mass. 378; 31 Am. St. Rep. 554; *Tyler v. Hall*, 106 Mo.

313; *Re McCarthy*, 55 Hun, 7; 28 N. Y. State Rep. 342.

⁷ *Blount v. Kimpton*, 155 Mass. 378; 31 Am. St. Rep. 554; *Tyler v. Hall*, 106 Mo. 313.

⁸ *Carey v. Carey*, 108 N. C. 267; *Re Smith's Will*, 61 Hun, 101; 39 N. Y. State Rep. 698; *Greer v. Greer*, 58 Hun, 251; 34 N. Y. State Rep. 448; *Sheldon v. Sheldon*, 133 N. Y. 1; 33 N. Y. State Rep. 754.

⁹ *Brennan v. Hall*, 131 N. Y. 160; 39 N. Y. State Rep. 180.

and not for the purpose of obtaining advice with reference to the title.¹ One who is both a creditor and an attorney for other creditors cannot be excluded from being a witness so far as his interest is concerned.² The testimony of an attorney who was not retained by either party to a transaction, but who acted as a sort of mutual friend between them, is not admissible.³ The statements of an attorney which are made to be communicated to others cannot be excluded from evidence on the ground that they are privileged.⁴ So a consultation by two or more persons with an attorney for their mutual benefit is not as between them privileged as being between attorney and client.⁵ The attorney who draws a deed at the request of the grantor is a competent witness to prove its delivery to him for the purpose of delivering to the grantee.⁶ He is also competent to prove that his client signed a certain instrument and the facts and circumstances connected with the signing.⁷ So an attorney is a competent witness to testify to payments made by him to a client for the purpose of establishing the genuineness of the latter's signature to a contract in evidence and under which the payments were made.⁸

III. PHYSICIANS AND PATIENTS.

§ 14. *In general.*—By the common law physicians may be compelled to disclose communications made to them in professional confidence.⁹ But as a general rule it is provided by statute in the different states of this country that no person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.

¹ Stallings v. Hullum, 79 Tex. 421. Rep. 792; Hurlburt v. Hurlburt, 40

² Reagen v. Aiken, 138 U. S. 109. id. 436; 128 N. Y. 420.

³ Haulenbeck v. McGibbon, 60 Hun, 26; 38 N. Y. State Rep. 652; 14 N. Y. 42 N. Y. State Rep. 871.
Supp. 393.

⁴ Ferguson v. McBean, 91 Cal. 63.

⁶ Rosseau v. Bleau, 131 N. Y. 177;

⁷ Rahm v. State, 30 Tex. App. 310.

⁸ Glenn v. Leggett, 47 Fed. Rep. 472.

⁹ Hard v. Ashley, 44 N. Y. State

⁹ Duchess of Kingston's Case, 20 St. Tr. 572.

These statutes have been modified and changed from time to time in the different states. The testimony of a physician or surgeon is not incompetent unless the information acquired by him while attending a patient was necessary to enable him to act in his professional capacity.¹ They may state the fact of their attendance upon the patient, but not his condition, even as regards sobriety, where knowledge was obtained in a professional capacity;² and the certificate of a physician, furnished as a part of the proof of loss under an insurance policy, is not incompetent as an admission on the part of the assured.³ A physician sent by a prosecuting authority to make a report upon the sanity of a prisoner is not disqualified from testifying to a communication made by the latter to him in the course of his examination as being prohibited from stating information acquired while attending a patient.⁴ So a defendant on trial for the murder of his patient cannot invoke the prohibition in his favor as to the testimony of another physician who consulted with him in treating the patient.⁵ A physician may testify to knowledge obtained from personal acquaintance with a patient before the commencement of his professional relations with him and after they cease.⁶ A physician is not prohibited from stating his opinion as to the mental condition of a patient, based upon knowledge obtained at times when he was not in attendance upon him in a professional capacity.⁷ And a physician is not prohibited from testifying as to the number of times and the dates when he attended a person, when he was first applied to, and while he attended him, to show that the party was not in good health at a certain time.⁸ So a physician is not prohibited from testifying upon an inquisition as to the lunacy of the patient.⁹

¹ *Harrington v. Winn*, 60 Hun, 235; 38 N. Y. State Rep. 83; *Re McQueen's Estate*, 37 id. 602.

² *Cooley v. Foltz*, 85 Mich. 47; *Kling v. Kansas City*, 27 Mo. App. 231; *Corbitt v. St. Louis, I. M. & S. R. Co.*, 26 id. 641.

³ *Buffalo Loan, T. & S. D. Co. v. Knights Templar & M. M. A. Ass'n*, 126 N. Y. 450; 38 N. Y. State Rep. 247; 44 Alb. L. J. 47.

⁴ *People v. Sliney*, 50 N. Y. State Rep. 391; 137 N. Y. 570.

⁵ *People v. Harris*, 136 N. Y. 423; 49 N. Y. State Rep. 751.

⁶ *Re Lowenstein's Estate*, 51 N. Y. State Rep. 423.

⁷ *Fisher v. Fisher*, 129 N. Y. 654; 42 N. Y. State Rep. 100; *Re Peck's Will*, id. 898.

⁸ *Patten v. United Life & Accident Ins. Ass'n*, 45 N. Y. State Rep. 661; 133 N. Y. 450.

⁹ *Re Benson*, 16 N. Y. Supp. 111.

In a suit to set aside a will on the ground of undue influence and incapacity, in which the dispute is between the devisees and heirs at-law, either the devisees or heirs may call the attending physician.

§ 15. **When physician prohibited from testifying.**— Unless the prohibition of the statute is waived, the opinion of a physician based upon information derived in the course of his professional attendance upon a testator of the latter's testamentary capacity is inadmissible in a proceeding for the probate of the will of such testator, and after the death of the patient, unless the prohibition is waived by all the parties interested.¹ But under the Code of Civil Procedure of New York state as it now stands, the prohibition against a physician testifying in regard to the mental condition of a deceased person may be waived by any party to the proceeding under which the physician is called. It has also eliminated the prohibition against a physician who is attached to any hospital, etc., from testifying to what he learned in such capacity. The fact that a plaintiff calls one of his physicians as a witness in his own behalf does not make another competent in behalf of the defendant.² A physician will not be permitted to testify regarding answers to inquiries propounded to an injured person whom he had been called to visit professionally concerning matters in which he had no interest or concern professionally, or which were made for the purpose of qualifying him as a witness, at least where they in any way relate to the inquiry or to the patient's former condition.³ The fact that a person consulted a physician in respect to personal injuries is sufficient in connection with questions whether he conversed with her about her injuries, to bring the question within the rule as to privileged communications.⁴ A member of a firm of physicians is incompetent to testify as to confidential communications relating to what he learned at a time when the person making such communications was at the firm's place of business to consult with the witness' partner.⁵

¹ Van Orman v. Van Orman, 58 Hun, 606; 34 N. Y. State Rep. 824; Loder v. Whelpley, 111 N. Y. 239; 19 N. Y. State Rep. 631.

² Mellor v. Missouri P. R. Co., 105 Mo. 455.

³ Pennsylvania Co. v. Marion, 123 Ind. 415.

⁴ Feeney v. Long Island R. Co., 116 N. Y. 375; 26 N. Y. State Rep. 729.

⁵ Aetna Life Ins. Co. v. Deming, 123 Ind. 384.

And a physician who is unable to separate the knowledge which he has acquired while attending a patient professionally from that which he has acquired in paying a friendly visit is not competent to testify as to such knowledge.¹

§ 16. **Waiver by patients.**—A statute making a physician incompetent to testify concerning any information acquired by him from a patient in a professional character merely gives the patient the privilege of suppressing such information, and he may waive the privilege.² Where a party himself testifies as to a consultation with a physician and pretends to give the circumstances of the privileged interview, the opposite party is not precluded from assailing such evidence by the testimony of such physician.³ It is not the duty of the party offering the testimony of a physician to show that the relation of physician and patient did not exist; but it is the duty of the party objecting to support his objections by proof of facts necessary to bring the case within the definition on which it is based. The exclusion is confined to information which the physician acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.

So, if a party testify to a confidential interview with his physician as to the nature and extent of an injury complained of, his adversary may call the physician who attended the party for the injury complained of, to contradict the story of the patient.⁴ In such cases the plaintiff by his own act opens the door for the admission of the testimony of the physician, and in that manner effectually waives the privilege. The privilege is founded on public policy; and in all cases where it applies the seal of the law must forever remain until it is removed by the act or consent of the patient. And a patient calling his physician to testify does not thereby waive his right to object to other physicians who may have treated him testifying upon the same subject.

The law forbids the disclosure of professional information, and the policy of the law is to protect patients in the free

¹ Re Darragh, 52 Hun, 591; 22 N. Y. State Rep. 553.

² Davenport v. Hannibal, 110 Mo. 574.

³ Marx v. Manhattan R. Co., 56 Hun, 575; 31 N. Y. State Rep. 914.

⁴ Treanor v. Manhattan R. Co., 41 N. Y. State Rep. 614; Marx v. Manhattan R. Co., 31 id. 914; 56 Hun, 575.

revelation of their maladies to the physician. But when the patient himself testifies to the information and uncovers his maladies and infirmities in court, he breaks the seal of secrecy and absolves the physician from the obligation of silence, and waives his privilege.¹ But it has been held that the privilege is not waived by the patient's own testimony concerning her ailments and disabilities, and which the physician's testimony is needed to contradict. But it has also been held that one suing for negligence, who testifies minutely to the effect of an injury upon her health and comfort, thereby waives the privilege conferred by statute, and her attending physician may be questioned to prove that she suffered from no such injuries as she represented.² The consent of a child seven years of age to a physician's testimony as to matters learned in his professional capacity may be given by either of his parents, and may be implied.³ And a party cannot be asked, as a witness, whether he is willing to waive the privilege. An attorney may waive the privilege of his client as to information acquired by a physician in attending him, and may call the physician as a witness.⁴ After the death of the patient the prohibition cannot be waived by any person.⁵

§ 17. **Clergymen.**—In certain cases communications to clergymen are privileged, on the ground of confidence and the general good; that the guilty conscience may with safety disburden itself by penitential confessions, and by spiritual advice, instruction and discipline seek pardon and relief. In most of the states it is provided by statute that "no minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character in the course of discipline enjoined by the rules or practice of such denomination."⁶

¹ Marx v. Manhattan R. Co., 56 Hun, N. Y. State Rep. 614; McConnell v. 575; 31 N. Y. State Rep. 914; McKinney v. Railroad Co., 104 N. Y. 352; ³ State v. Depoister (Nev.), 25 Pac. 4 N. Y. State Rep. 349; People v. Rep. 1000.
Schuyler, 106 N. Y. 298; 8 N. Y. State ⁴ Alberti v. New York, L. E. & W. R. Rep. 860; Hunt v. Blackburn, 128 Co., 118 N. Y. 77; 27 N. Y. State Rep. U. S. 464; Treanor v. Manhattan R. 865; Thompson v. Ish, 99 Mo. 160.
Co., 41 N. Y. State Rep. 614. ⁵ Loder v. Whelpley, 111 N. Y. 239;

² Treanor v. Manhattan R. Co., 41 19 N. Y. State Rep. 631.

⁶ People v. Gates, 13 Wend. 311.

IV. STATE SECRETS.

§ 18. **In general.**—Secrets of state, or things the disclosure of which would be prejudicial to the public interest, are excluded from motives of public policy. Thus, in criminal trials the names of persons employed in the discovery of the crime are not permitted to be disclosed. So a witness who has been employed to collect information for the use of the government, or for the purpose of the police, will not be permitted to disclose the name of his employer, or the nature of the connection between them, or the name of any person who was the channel of communication with the government or its officers.¹

§ 19. **State officials.**—Official transactions between the heads of the departments of state and their subordinates are generally treated as privileged communications. Thus the correspondence between an agent of the government and the secretary of state,² or between a governor and an officer under him, are confidential and privileged matters which will not be permitted to be disclosed except to the legislative branches of the government. The president of the United States and the governors of the several states are not bound to produce papers or disclose information communicated to them, when in their judgment the disclosure would, on public considerations, be inexpedient. And it seems that in such cases secondary evidence of the contents of state papers will not be received.³

§ 20. **Grand jurors.**—Proceedings of grand jurors are privileged communications. The rule includes not only the grand jurors themselves but their stenographers and the district attorney. They are not permitted to disclose who agreed to find the bill of indictment or who did not agree; nor to detail the evidence on which the indictment was founded.⁴

¹ *Totten v. United States*, 92 U. S. 105; *Burr's Trial*, 186; *Oliver v. Pate*, 41 Ind. 182; *Hannum v. Belchertown*, 19 Pick. 311. ³ *Washington v. Scribner*, 109 Mass. 487.

² *Marbury v. Madison*, 1 Cranch, 144. ⁴ *Com. v. Hill*, 11 Cush. 137; *State v. Fassett*, 16 Conn. 457; *State v. Beebe*, 17 Minn. 241.

V. HUSBAND AND WIFE.

§ 21. **In general.**—As a general rule confidential communications between husband and wife belong to the class of privileged communications and are therefore protected. The law provides that the confidential communications between husband and wife shall be kept forever inviolable. Therefore, after the parties are separated, whether it be by divorce or by the death of one of them, the other is still precluded from disclosing any confidential communication with the other. This rule is founded on principles of public policy, which lie at the basis of civil society. At common law neither husband nor wife could testify to a communication of whatever nature, confidential or otherwise, which passed between them. And neither was allowed to testify to matters to the detriment of the other in any case civil or criminal.¹ Now the general rule in civil cases is that no person shall be excluded or excused from being a witness because he or she is the husband or wife of a party, or of a person in whose behalf the action or special proceeding is brought, prosecuted, opposed or defended, except a husband or wife shall not be compelled, or without the consent of the other, if living, allowed to disclose a confidential communication made by one to the other during the marriage. Thus the husband cannot, as against his wife, be permitted to testify in regard to his discussions with her concerning her alleged improper relations with another man, such discussions being communications induced by the marital relation.² But voluntary testimony by a wife as to admissions made to her husband is not a violation of the New York Penal Code, section 715, or New Code of Criminal Procedure, section 392, providing that a husband or wife shall not be compelled to disclose confidential communications made by one to the other, when given in a prosecution of the husband for obtaining her money under false pretenses.³ A communication between a husband and wife in the presence of a third party who is competent to testify is not privileged.⁴

¹ Southwick v. Southwick, 49 N. Y. 510.

³ People v. Lewis, 62 Hun, 622; 42 N. Y. State Rep. 768.

² Warner v. Press Pub. Co., 132 N. Y. 180; 43 N. Y. State Rep. 633.

⁴ Lyon v. Prouty, 154 Mass. 488.

§ 22. **Marriage — Proof of, necessary.**— The rule of protection to confidential or other communications between husband and wife is extended only to lawful marriages. Thus, upon a trial for polygamy, the first marriage being proved and not controverted, the woman with whom the second marriage was had is a competent witness. But it is different if the first marriage is controverted.¹ But cohabitation and acknowledgment as husband and wife are conclusive against the parties, except where the fact or the incidents of marriage, such as legitimacy and inheritance, are directly in controversy.

§ 23. **Illustrations.**— Letters written by a husband to his wife during their marriage, having reference to business carried on by them, and showing that such business was unprofitable, are privileged, and cannot be given by a wife in an action by her against her husband's heirs and devisees.² But, usually, business transactions between them are not confidential communications;³ nor are communications made in the presence or hearing of third persons.⁴ A statement by a man to his wife that he had improper relations with another woman, which he afterwards admitted to be false and to have been made with the hope of inducing a similar confession from her in return, is not privileged in an action by her for a separation on the ground of conduct making it unsafe and improper for her to cohabit with him.⁵ The communications of husband and wife, not made in the presence of third persons, though they consist of opprobrious epithets, which would furnish ground for divorce as being intolerable indignities, does not render the husband and wife competent to testify concerning them;⁶ and a husband cannot, after the death of his wife, testify to conversations of a confidential character had with his wife, even when he is contesting the probate of her will.⁷ Nor can a husband on trial for a crime, who has offered himself as a witness, be examined by the state as to any communications between his wife and himself.⁸

¹ 2 Stark. Ev. 400.

⁵ Fowler v. Fowler, 33 N. Y. State

² Mitchell v. Mitchell, 80 Tex. 101. Rep. 746.

³ Schaffner v. Reuter, 37 Barb. 44.

⁶ Ayers v. Ayers, 28 Mo. App. 97.

⁴ State v. Center, 35 Vt. 385; Troy Fertilizer Co. v. Logan, 90 Ala.

⁷ Maynard v. Vinton, 59 Mich. 139; 60 Am. Dec. 276.

325.

⁸ People v. Mullings, 83 Cal. 138.

§ 24. **Personal privileges.**—Not all communications made between husband and wife when alone are confidential. Confidential communications are such communications as are expressly made confidential, or such as are of a confidential nature, or induced by the marital relation.¹ And where a husband or wife to whom a confidential communication is addressed makes it public by giving it to another, it may be put in evidence if otherwise admissible. If the privilege has once been waived by the parties it cannot be again invoked. It is personal, so that if one ever hears such a communication he may testify to it if it be otherwise admissible in evidence, as the confidential character of the communication has departed.² Personal privilege as to a confidential communication between husband and wife is not only available to the one called as a witness, but is available as well to the other spouse against whom it is offered.³ In many if not all the states, the common-law rule that husband and wife cannot be witnesses for or against each other has been modified by statute. These statutes make a husband or wife of a person indicted or accused of a crime a competent witness, but neither husband nor wife can be compelled to testify in such cases against the other, nor can they disclose a confidential communication made by one to the other during their marriage. These statutes do not leave the matter entirely to the discretion of the one who is a witness, but the other party to the communication, or if he is a party to the suit, may object to the party's testifying, and, upon such objection being made, the witness not only cannot be compelled, but he or she has no right, to testify or make the disclosure.⁴ But the party seeking to suppress evidence as a privileged communication has the burden to show that such is its character.⁵ The privilege of objecting to the disclosure of privileged or confidential communications is not available to a stranger.⁶

¹ *Parkhurst v. Berdell*, 110 N. Y. 386; 18 N. Y. State Rep. 193.

² *State v. Hoyt*, 47 Conn. 518; *People v. Hayes*, 140 N. Y. 484; 56 N. Y. State Rep. 463; *Com. v. Griffin*, 110 Mass. 181; *State v. Center*, 35 Vt. 386.

³ *People v. Wood*, 126 N. Y. 249; 36 N. Y. State Rep. 952.

⁴ *People v. Wood*, 126 N. Y. 249; 36 N. Y. State Rep. 952.

⁵ *Henry v. New York, L. E. & W. R. Co.*, 57 Hun, 76; 32 N. Y. State Rep. 16; *Heath v. Broadway & S. A. R. Co.*, 29 id. 267; 57 Super. Ct. 496; *Sharon v. Sharon*, 79 Cal. 632.

⁶ *McNutt's Appeal* (Pa.), 19 Atl. Rep. 936.

§ 25. **Offer to settle or compromise.**—Negotiations or propositions looking to the settlement of a controversy without action cannot be given in evidence as admissions of liability. The rule is well founded in reason. The law is willing to encourage the compromise and settlement of controversies without litigation, and holds communications looking to that end as privileged in their character, and not to be used to the prejudice of the party making them. It is true the privilege does not extend to the admission of a disputed fact, even though made in the course of such negotiations. The principle is that an offer, or consent, or expression of willingness to settle, is not to be taken as an admission of liability, and is therefore not evidence of the fact. The same rule excludes evidence of a settlement of the claim of another person for damages done by the same negligence.¹

While it is said that an offer of a sum by way of compromise is admissible, unless stated to be confidential or made without prejudice,² the general rule is that no offer made by either party by way of compromise or to buy peace is admissible as an admission in a civil suit, if it is made either upon an express condition that evidence of it is not to be given,³ or under circumstances from which it may be inferred that the parties agreed together that evidence of it should not be given;⁴ admissions of any independent facts are competent, though made during a treaty or compromise.⁵ Thus an offer of compromise, for the purpose of evading trouble and purchasing his peace by the person making it, is not admissible in evidence,⁶ either as admission of guilt or liability;⁷ and an

¹ *Slingerland v. Norton*, 58 Hun, 578; 35 N. Y. State Rep. 426; *York v. Conde*, 66 Hun, 316; 49 N. Y. State Rep. 544.

² *Brice v. Bauer*, 108 N. Y. 428; 13 N. Y. State Rep. 765.

³ *York v. Conde*, 66 Hun, 316; 49 N. Y. State Rep. 544; *Darby v. Roberts* (Tex.), 22 S. W. Rep. 529; *Cory v. Bretton*, 4 C. & P. 462.

⁴ *Home Ins. Co. v. Balt. W. Co.*, 93 U. S. 527; 1 *Phillips' Ev.* 147; *Paddock v. Forrester*, 5 M. & G. 918.

⁵ *Murray v. Coster*, 4 Cow. 618; *Gerrish v. Sweetzer*, 4 Pick. 374; *Hart-*

ford Bridge Co. v. Granger, 4 Conn. 142.

⁶ *Gommersall v. Crew*, 31 N. Y. State Rep. 555; *Chaffee v. Mackenzie*, 43 La. Ann. 1062; *Gries v. Blackman*, 30 Mo. App. 2; *Chickering v. Brooks*, 61 Vt. 554.

⁷ *State v. Lavin*, 80 Iowa, 555; *Patrick v. Crow*, 15 Colo. 543; *Montgomery v. Allen*, 84 Mich. 656; *Smith v. Satterlee*, 130 N. Y. 677; 41 N. Y. State Rep. 711; *Davey v. Lohrmann*, 39 N. Y. State Rep. 207; 14 N. Y. Supp. 922.

unaccepted offer of compromise by a defendant in a bastardy case is not admissible in evidence.¹ An offer to pay a certain amount rather than have litigation is inadmissible.² Evidence of a demand by plaintiff for a less sum than that claimed in the action, with a statement that he should sue if not paid, is admissible in the absence of proof that the same was made as a compromise offer, or while negotiating for a peaceful settlement, or in view of a compromise.³ Admissions of particular facts concerning a claim, in a letter offering to pay a certain amount to compromise it, are competent evidence, although the offer to pay it is not.⁴

¹ Olsen v. Peterson, 33 Neb. 353.

³ Severson v. Klemschmidt (Mont.),

² Denver T. & G. R. Co. v. De Graff, 26 Pac. Rep. 198.

² Colo. App. 42.

⁴ Wright v. Gillespie, 43 Mo. App. 244.

CHAPTER V.

COMPETENCY OF WITNESSES.

<p>§ 1. In general.</p> <p>2. Religious belief.</p> <p>3. Illustrations.</p> <p>4. Infants.</p> <p>5. Illustrations.</p> <p>6. Idiots and lunatics.</p> <p>7. Illustrations.</p> <p>8. Persons convicted of crime.</p> <p>9. How incompetency removed.</p> <p>10. Husband and wife.</p> <p>11. Extent of the rule.</p> <p>12. When relation begins and terminates.</p> <p>13. Exception to rule of exclusion in criminal cases.</p>	<p style="text-align: center;">EFFECT OF DEATH OR DISABILITY OF OTHER PERSONS.</p> <p>§ 14. In general.</p> <p>15. Interested third persons.</p> <p>16. Assignors, grantors, etc., of parties as witnesses.</p> <p>17. Heirs, legatees, distributees, etc., as witnesses.</p> <p>18. Agents and representatives as witnesses.</p> <p>19. Effect of prior evidence on other side.</p> <p>20. What is not a personal transaction.</p> <p>21. Illustrations.</p>
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§ 1. In general.— A witness is incompetent if, in the opinion of the court, he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth.¹ A witness unable to speak or hear is not incompetent, but he may give his evidence by writing or by signs, or in any other manner in which he can make it intelligible; but such writing must be and such signs made in open court. Evidence so given is deemed to be oral evidence.²

Witnesses not believing in the existence of a God are, at common law, incompetent to testify;³ but this rule has been modified by statute in the several states. So, at common law, witnesses convicted of crimes rendering them infamous are excluded from giving testimony in the courts of the state

¹ 1 Greenl. Ev., § 363; 1 Whart. Ev., 107; Snyder v. Nations, 5 Blackf. § 398. 295; State v. De Wolfe, 8 Conn. 93.

² Stephen's Dig. of Law of Ev., art. 3 O'Michund v. Barker, 1 Smith's Lead. Cas. 536, 545.

or county in which they were convicted, unless the disability is removed by a reversal of the judgment or by a pardon. In most of the states the disqualification of infamy has been removed by constitutional provision or by statute.¹ At common law all persons who were parties to the record or had a pecuniary interest in the result of the suit were incompetent to testify. But this disability has been removed by statute in all of the states of the Union excepting Delaware, and all the territories excepting New Mexico. So, by the Revised Statutes of the United States, section 858, it is provided that in the courts of the United States no witness shall be excluded "in any civil action because he is a party to or interested in the issue tried; provided, that in actions by or against executors, administrators or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the others as to any transaction with or statement by testator or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."²

By the common law husband and wife are incompetent to testify for or against each other, except in cases of personal injuries committed by one against the other.³ To this rule the act of congress making parties to suits competent witnesses has no application.⁴ And in criminal cases the accused person and his or her wife or husband, and every person and the wife or husband of every person jointly indicted with him, is incompetent to testify, provided that in any criminal proceeding against a husband or wife for any bodily injury or violence inflicted upon his or her wife or husband, such wife or husband is competent to testify.⁵ The above rule of the common law has been materially modified by statute in the several states and territories. Generally under these statutes husband and wife are not compellable to testify against each other in criminal proceedings, and in some of them are not competent witnesses in actions for divorce.

§ 2. Religious belief.—It is an established rule that all witnesses who are examined upon a trial, civil or criminal,

¹ 1 Greenl. Ev., § 372; 1 Whart. Ev., § 397.

² Texas v. Chiles, 21 Wall. 488; Railroad Co. v. Pollard, 22 id. 341.

³ 1 Greenl. Ev., § 343.

⁴ Lucas v. Brooks, 18 Wall. 436.

⁵ Reese v. Wood, 5 B. & S. 364.

must give their evidence under the sanction of an oath, or some affirmation substituted in lieu thereof. If any person called as a witness refuses or is unwilling to be sworn from alleged conscientious motives, he will be allowed to make solemn religious affirmation, involving like appeal to God in the truth of his testimony, in any mode which he shall declare to be binding on his conscience. All witnesses are to be sworn according to the peculiar ceremonies of their own religion, or in such manner as they may deem binding on their own consciences; and if the witness be not of the Christian religion, the court will inquire as to the form in which an oath is administered in his own country or among those of his own faith, and will impose it in that form. One who believes in the existence of God, and that an oath is binding on his conscience, is a competent witness, though he does not believe in a future state of rewards and punishments.¹ This belief in a future state goes only to credit.² But it has been held that persons who do not believe in the obligations of an oath, or the future state of rewards and punishments, are incompetent witnesses.³

§ 3. **Illustrations.**—A witness will be presumed competent until his incompetency is specifically pointed out by the party objecting to him.⁴ Religious opinion or belief or want of the same is not a test or qualification of the competency of citizens to testify as witnesses in courts of justice under a statute which provides that “no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions.”⁵ Thus a Chinaman who believes in the Chinese religion, but takes the ordinary form of oath without objection, and testifies that he regards it as binding, is, so far as concerns religious belief, a competent witness.⁶

¹ *Brock v. Milligan*, 10 Ohio, 121. But see *Central M. Tr. Co. v. Rockafellow*, 17 Ill. 541; *Blair v. Seaver*, 2 Casey, 274; *Bartholemey v. People*, 2 Hill, 249; *Smith v. Coffin*, 18 Me. 157; *Cubbison v. McCurry*, 2 Watts & Serg. 262; *Arnold v. Arnold*, 13 Vern. 362; 1 Greenl. Ev., § 371.

² *Hunscum v. Hunscum*, 15 Mass. 184.

³ *Curtiss v. Strong*, 4 Day's Cases, 51; *Wakefield v. Rose*, 5 Mason, 16; *Butts v. Smartwood*, 2 Cow. 431, 572, note.

⁴ *Knight v. Jackson*, 36 S. C. 10; *Perine v. Grand Lodge A. O. U. W.*, 48 Minn. 82.

⁵ *Hronek v. People*, 12 Crim. Law Mag. 1022.

⁶ *Territory v. Yee Shun*, 3 N. M. 82.

§ 4. **Infants.**—No particular age is required in practice to render the evidence of a child admissible; the competency of children is now regulated, not by their age, but by the degree of understanding which they appear to possess. A child of any age, if capable of distinguishing between good and evil, may be examined upon oath, and a child of whatever age cannot be examined unless sworn. The admissibility of children depends not merely upon their possessing a competent degree of understanding, but also in part upon their having received a certain share of religious instruction. A child whose intellect appears to be in other respects sufficient to enable it to give useful evidence may, from defect of religious instruction, be wholly unable to give any account of the nature of an oath, or of the consequences of falsehood. The court must be satisfied that the child feels the binding obligation of an oath from the general course of his religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, recently communicated to him for the purpose of the trial. But courts have held that an infant cannot be rejected if he has knowledge of the nature of an oath, whether the instruction was intended to excite permanent feelings or merely to secure the temporary purpose of enabling him to swear to the facts in a particular case, provided that at the time when he was called upon to give his evidence he was really aware of the solemn responsibility which devolved upon him for speaking the truth. A child of any age capable of distinguishing between good and evil may be examined on oath; and the credit due to his statements is to be submitted to the consideration of the jury, who should regard the age, the understanding, and the sense of accountability for moral conduct, in coming to their conclusion.¹ Where a case depends upon the testimony of an infant it is for the court to examine him as to his competency to take an oath, and, if found incompetent for want of proper instruction, the court will, in its discretion, put off the trial in order that the party may in the meantime receive such in-

¹ Washburn v. People, 10 Mich. 372; State v. Whittier, 21 Me. 341.

struction as will qualify him to take an oath.¹ The inquiry is commonly confined to the ascertaining of the fact whether a child has a conception of divine punishment being a consequence of falsehood; it seldom extends as far as to ascertain the child's notion of an oath, and scarcely ever relates to the legal punishment of perjury.²

§ 5. **Illustrations.**—Persons who have no comprehension of the nature and obligation of an oath, and are incapable of appreciating their responsibility for its violation, are incompetent as witnesses without regard to the cause from which the defect had arisen, and without reference to the age of the witness.³ Thus, a deaf and dumb child about nine years old, wholly uneducated in the deaf and dumb language, and who cannot be made to understand such questions as might be put to him touching the transaction, except to a limited extent, by signs and gestures, and who can only give by signs account of what he saw, is not a competent witness in a capital case, although he was the only eye-witness of the transaction;⁴ and a witness fourteen years old who states that he knows it is wrong to tell a lie, but that he did not know that he would be punished for it, is incompetent. So a child of tender years is not a competent witness in a criminal prosecution, where it has not the slightest conception of any future, much less future punishment for perjury;⁵ but there is no precise or fixed rule as to the time within which infants are excluded from giving evidence, but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court.⁶ Thus, the capacity and qualification of a witness only nine years old, who states that he does not know the nature of an oath, but knows that people are sworn to make them tell the truth, and that he will tell the truth, is a matter for the determination of the trial judge.⁷ The admission of testimony of a witness twelve years old who appears to have the ordinary understanding and intelligence of boys of that age, and who, although not comprehending

¹ 1 Stark. Ev. 94.

² 1 Fell. Ev. 6.

³ McKelton v. State, 88 Ala. 181.

⁴ Territory v. Duran, 3 N. M. 134.

⁵ Johnson v. State, 76 Ga. 76.

⁶ McGuff v. State, 88 Ala. 147.

⁷ State v. Doyle, 107 Mo. 36.

the questions in the English language, gives satisfactory answers through an interpreter, is not error.¹

§ 6. **Lunatics and idiots.**—Persons not possessing the use of their understanding, as idiots and lunatics, if they are either continually in that condition or subject to such a frequent recurrence of it as to render it unsafe to trust their testimony, are incompetent witnesses. An idiot is a person who has been *non compos mentis* from his birth, and who has never any lucid intervals. A lunatic is a person who enjoys intervals of sound mind, and may be admitted as a witness *in lucidis intervallis*. He must of course have been in possession of his intellect at the time of the event to which he testifies as well as at the time of examination; and it ought to appear that no serious fit of insanity has intervened so as to cloud his recollection and cause him to mistake the illusion of imagination for the events he has witnessed. With regard to those persons who are afflicted with monomania, or an aberration of mind on one particular subject, not touching the matter in question, and whose judgment in other respects is correct, the safest rule appears to be to exclude their testimony, it being impossible to calculate with accuracy the extent and influence of such a state of mind. Where a lunatic is tendered as a witness, it is for the judge, assisted by medical testimony, to determine whether he shall be admitted; and if, upon his examination upon the *voir dire*, he exhibits a knowledge of the religious nature of an oath, and appears capable of giving an account of transactions of which he has been an eye-witness, it is a ground for his admission. It is for the jury to judge of the credit that is to be given to his testimony.² The question whether a witness, sane at the time he testifies, was insane at the time of the transaction with regard to which he testifies, goes to the credibility of his testimony, and not to his competency, and is therefore a subject for evidence to the jury, to be adduced by the opposing party with his other evidence.³ It is no objection either to the competency or credibility of a witness that he is subject to fits of mental derangement, if it appears that he is sane at

¹ State v. Severson, 78 Iowa, 653.

³ Holcomb v. Holcomb, 28 Conn.

² Livingston v. Kiersted, 10 Johns. 177.

the time he is offered.¹ A person in a state of intoxication is incompetent.² An objection to the competency of a witness must be made as soon as it is discovered when the party has an opportunity of doing it; otherwise the party will be considered as having waived the objection. The most convenient time to object is before the witness is sworn.

§ 7. **Illustrations.**—A witness who has been adjudged insane is incompetent, and it makes no difference from what cause this defect of understanding may have arisen; nor whether it be temporary and curable, or permanent; whether the party be hopelessly an idiot, or maniac, or only occasionally insane, as a lunatic, or be intoxicated; or whether the defect arises from mere immaturity of intellect.³ While the deficiency of understanding exists, be the cause of what nature soever, the person is not admissible to be sworn as a witness. But if the cause be temporary, and a lucid interval should occur, or a cure be effected, the competency is also restored.⁴

§ 8. **Persons convicted of crime.**—In some states and in the federal courts persons who have been convicted of certain heinous crimes are held to be incompetent to testify as witnesses either in civil or criminal cases. The basis of the rule seems to be, that such persons are morally too corrupt to be trusted to testify. The party, however, must have been legally adjudged guilty of the crime; the record, therefore, is required as the sole evidence of his guilt, no other proof being admitted of the crime. But the difficulty lies in the specification of the crimes which render the perpetrator thus infamous. The usual and more general enumeration is, treason, felony, and the *crimen falsi*.⁵ But the meaning of the term *crimen falsi*, in our law, is nowhere laid down with precision. A conviction and sentence in a state court can have no effect, by way of penalty or of personal disability or disqualification, beyond the limits of the state in which the judgment is rendered, unless the statute of another state gives such effect to them.⁶ An act of congress making a defendant charged with crime a competent witness at his own request, but not other-

¹ Campbell v. State, 23 Ala. 44.

⁴ Lopez v. State, 30 Tex. 487.

² Gebhart v. Skinner, 15 Serg. & Rawle, 235.

⁵ 1 Phil. Ev. 18; 1 Stark. Ev. 94.

⁶ Logan v. United States, 144 U. S.

³ Huling v. Huling, 32 Ill. App. 519. 263.

wise, does not confer any peculiar exemption, and does not render competent a defendant who has lost the privilege of testifying by the commission of an infamous crime.¹

§ 9. **How incompetency removed.**—The disability arising from infamy may, in general, be removed in two modes: first, by reversal of the judgment of conviction of the crime. The reversal of the judgment must be shown by the production of the record of reversal, or by a duly certified copy thereof. The disability is also removed by a full and general pardon.² Such pardon must be proved by the letter of pardon under the seal of the state. Thus a pardon by the president of one convicted in the United States district court of larceny, and sentenced to the penitentiary, restores his competency as a witness.³ So a full pardon by a governor, granted to a convict after he had served out his term of imprisonment, therefore takes away all disqualifications as a witness, and restores his competency to testify to any facts within his knowledge, even if they came to his knowledge before his disqualifications had been removed by the pardon.⁴

§ 10. **Husband and wife.**—By the common law a husband and wife cannot testify for or against each other except in cases of violence of one upon the other as hereinafter more fully specified, and the same rule still prevails in the absence of any statute changing it.⁵ To this rule the act of congress and the statutes of the several states making parties to suits competent witnesses has no application.⁶ In most of the states, however, the disqualification has, to a greater or less extent, been removed by special statutes. Generally, under these statutes, husband and wife are not compellable to testify against each other in criminal proceedings, and in some of them are not allowed to testify to certain things in cases for absolute divorce.⁷ The New York statute provides that no person shall be excluded from being a witness because he or she is the husband or wife of a party, or of a person in whose

¹ United States v. Hollis, 43 Fed. Rep. 248.

² State v. Kirschner, 23 Mo. App. 349.

³ Boyd v. United States, 142 U. S. 450.

⁴ Logan v. United States, 144 U. S. 263.

⁵ Owen v. State, 89 Tenn. 698.

⁶ Lucas v. Brooks, 18 Wall. 433.

⁷ 1 Greenl. Ev., §§ 254, 336; 1 Whart. Ev., § 427.

behalf the action or special proceeding is brought, prosecuted, opposed or defended.¹ But a husband or a wife is not competent to testify against the other upon the trial of an action, or the hearing upon the merits of a special proceeding founded upon an allegation of adultery, except to prove the marriage. A husband or wife shall not be compelled or, without the consent of the other if living, allowed to testify against the other in a criminal action except when the crime charged was committed on or against the other, or to disclose a confidential communication made by one to the other during the marriage. In an action for criminal conversation the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matters in controversy; except that she cannot, without plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff. A defendant in an action for absolute divorce on the ground of adultery may disprove the allegation of adultery, not merely by a simple denial, but by testifying to any fact or circumstance within her knowledge competent and material on the question as to whether the act as charged was committed or not.² It has also been held that a husband or wife is not competent to testify in an action for divorce on the ground of adultery to jurisdictional facts—such as residence of the plaintiff at the time of the commission of the offense and the commencement of the action—when these are put in issue.³ A divorced wife is a competent witness, on the trial of her husband for an attempt to poison her before they were divorced, to testify that she saw him prepare the poison which was offered her.⁴ She is also competent, on the trial of an indictment for conspiring to confine her in a hospital for the insane, to testify to any fact in regard to the matter.⁵ But a wife is incompetent to prove her husband's fraud, even to corroborate his admissions, or as to any fact which tends to criminate her husband.⁶ And a plaintiff suing for the de-

¹ N. Y. Code of Civ. Pro., § 828.

576; 45 N. Y. State Rep. 823; 18 N.

² *Stevens v. Stevens*, 54 Hun, 490; Y. Supp. 485.

27 N. Y. State Rep. 602; 8 N. Y. Supp.

⁴ *Com. v. Sapp*, 90 Ky. 580.

47; *Steffins v. Steffins*, 11 id. 424; 33

⁵ *Com. v. Spink*, 137 Pa. St. 255.

N. Y. State Rep. 643.

⁶ *Cornelius v. Hanbay*, 150 Pa. St.

³ *Dickinson v. Dickinson*, 63 Hun, 359.

bauching of his wife is not a competent witness to prove her adultery with defendant; and so a wife is not a competent witness for her husband in an action brought by him for her seduction.¹ Business transactions between them are not confidential communications within the policy of the law.² Otherwise under the Massachusetts statute.³ Written as well as verbal communications, if confidential, are within the policy of the law. When either husband or wife is strictly incompetent as a witness, either generally or as to a particular fact, evidence of his or her declaration of the fact is incompetent except where the making of such declarations is a material fact; when the declaration is part of the *res gestæ* involved in an act properly in evidence; when it is merely matter of inducement on introduction to the language or conduct of another person which the declaration offered called forth; when it is one which the declarant made, when authorized, expressly or impliedly, to speak as the other's agent, or as one to whom the other referred a third person.⁴

§ 11. **Extent of rule.**—The wife is not a competent witness against a co-defendant tried with her husband, if the testimony concern the husband, though it be not directly against him.⁵ Nor is she a witness for a co-defendant if her testimony would tend directly to her husband's conviction or acquittal; nor where the interests of all the defendants are inseparable.⁶ Yet where the grounds of defense are several and distinct, and in no manner depend on each other, the wife of one defendant may testify as a witness for another.⁷ But where the wife of one defendant is called to prove an *alibi* in favor of another jointly indicted, she is incompetent, if her evidence goes to weaken that of the witnesses of her husband.

§ 12. **When relation begins and terminates.**—It makes no difference at what time the relation of husband and wife commenced; neither is it material that this relation no longer

¹ Reynolds v. Schaffer, 91 Mich. 338; Karney v. Paisley, 13 Iowa, 89; 494; 30 Am. St. Rep. 492. Dawson v. Hall, 2 Mich. 390.

² Schaffner v. Reuter, 37 Barb. 44.

⁵ Rex v. Hood, 1 Moody's Cr. Cas.

³ Drew v. Tarbell, 117 Mass. 90.

281.

⁴ Lay Grae v. Peterson, 2 Sandf.

⁶ Com. v. Robinson, 1 Gray, 555.

⁷ 1 Phil. Ev. 75.

exists; and whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires cannot be afterwards divulged in testimony, even though the other party be no longer living.¹ This rule of protection extends only to lawful marriages. It seems, however, that a reputed or supposed wife may be examined until a marriage in fact is proved. Whether the rule may be relaxed so as to admit the wife to testify against the husband, by his consent, the authorities are not agreed. Whether where the husband and wife are jointly indicted for a joint offense, or are otherwise joint parties, their declarations are mutually receivable against each other is still questioned; the general rule as to persons jointly concerned being in favor of their admissibility, and the policy of the law of husband and wife being against it.

§ 13. Exception to rule of exclusion in criminal cases.—

There are exceptions to the rule excluding the husband and wife as witnesses in criminal cases and to the exclusion of their confidential communications. These exceptions are allowed from the necessity of the case — not a general necessity, as where no other witness can be had, but a particular necessity; as where, for instance, the one would otherwise be exposed, without remedy, to personal injury.² Thus a woman is a competent witness against a man indicted for forcible abduction and marriage if the force were continuing upon her until the marriage.³ So she is a competent witness against him for any crime committed by him upon her; and in all cases of personal injury committed by the husband or wife against each other the injured party is a competent witness against the other.⁴ Upon the same principle the dying declarations of either are admissible where the other party is charged with the murder of the declarant.⁵

EFFECT OF DEATH OR DISABILITY OF OTHER PERSONS.

§ 14. In general.—The general policy of the American statutes is to restrain the admissions of the testimony of a

¹ *Stein v. Bowman*, 13 Pet. 209.

⁴ *People v. Chegaray*, 18 Wend. 642.

² *Bently v. Cooke*, 3 Doug. 422.

⁵ *People v. Green*, 1 Denio, 614.

³ 1 Russ. on Crimes, 572; Roscoe's
Crim. Ev. 115.

party or an interested witness as against the estate of a deceased person, lunatic or idiot, or the interest of one succeeding to his right;¹ and as to any personal transaction or communication with a deceased person, idiot or lunatic, a party to an action or proceeding cannot be examined in his own behalf or interest or in behalf of the party succeeding to his title or interest as against the representatives of a deceased person, idiot or lunatic, or one deriving title from such deceased person, idiot or lunatic, if he or his predecessor in interest is at the time of the trial interested in the event of the action or proceeding, whether directly interested in the cause of action or proceeding, or whether liable to be legally affected by the judgment;² and as against such representative of a deceased person, idiot or lunatic, no person through, from or under whom such a party or interested person derives his title or interest by assignment or otherwise can be examined in his own behalf or interest or in behalf of the party succeeding to his title or interest; or as to any personal transaction or communication with such deceased person, idiot or lunatic.³ To render a witness incompetent, as a person interested in the event of the action, to testify to conversations with deceased persons, his interest must be immediate and such as would render the record of the action an instrument of evidence for or against him in another action.⁴

A witness is not incompetent, under the New York Code of Civil Procedure, section 829, providing that one interested in the event of the suit shall not testify in his own behalf against one deriving title from a decedent, to testify to a conversation relating solely to the title to land with a decedent through whom he derived his title, where the adverse party, although claiming title, never had any and therefore did not derive title through such decedent;⁵ and a mother who has made a contract by which she surrendered her child in consideration that the other parties thereto should devise to it all their property

¹ Wilcox v. Corwin, 117 N. Y. 500; 27 N. Y. State Rep. 836.

² Cole v. Gardner, 67 Miss. 670.

³ Hard v. Ashley, 63 Hun, 634; 44 N. Y. State Rep. 792.

⁴ Perine v. Grand Lodge A. O. U. W., 48 Minn. 82.

⁵ Bell v. Howe, 65 Hun, 625; 47 N. Y. State Rep. 86; 19 N. Y. Supp. 569.

at their death is not incompetent in an action by the latter's heirs to recover the property from the child, in which the latter asserts her equitable rights under such contract, to testify to such contract, under the New York Code of Civil Procedure, section 829.¹ So a wife is a competent witness, under the New York Code of Civil Procedure, section 829, as to the circumstances of her engagement as a nurse by a person since deceased, in an action by her husband in his own right for the reasonable value of her services, based upon his common-law right to the benefit thereof.² That the husband of a devisee will be entitled as tenant by curtesy in the devised premises in case of the death of his wife intestate does not make him an interested party, incompetent as a witness to testify in reference to transactions between himself and the testator, on an issue as to whether the will was procured by fraud and undue influence.³ Upon the death of one who promised, in consideration of a conveyance of certain property to him, to pay the debt of another, the creditor is a competent witness to prove the promise.⁴ Testimony of plaintiff in a suit against a physician as the surviving partner in respect to the deceased partner's declarations while engaged in the business of the firm is not inadmissible;⁵ but where, after the institution of a suit on a joint and several note, one of the defendants makes default, and the plaintiff and the other defendant afterwards die, the defaulting defendant is incompetent, under the New York Code of Civil Procedure, section 829, to testify in an action by the personal representatives to facts proving the joint liability of the deceased defendant and his duty to contribute.⁶ In *McHugh v. Doud*⁷ it is held that an administrator cannot waive the provisions of the statute prohibiting the party from testifying, in support of a claim against the estate, to facts equally within the knowledge of the decedent; and in *Achilles v. Achilles*⁸ it is held that a

¹ *Godine v. Kidd*, 46 Alb. L. J. 171; 46 N. Y. State Rep. 813; 64 Hun, 585; 19 N. Y. Supp. 335.

² *Porter v. Dunn*, 43 N. Y. State Rep. 193; 131 N. Y. 314.

³ *Bowen v. Sweeney*, 63 Hun, 224; 44 N. Y. State Rep. 182.

⁴ *Hooper v. Hooper*, 32 W. Va. 526.

⁵ *Hess v. Lowery*, 122 Ind. 225; *Shain v. Forbes*, 82 Cal. 577.

⁶ *Wilcox v. Corwin*, 117 N. Y. 500; 27 N. Y. State Rep. 836

⁷ 86 Mich. 412.

⁸ 137 Ill. 589.

widow suing the heirs of her deceased husband to set aside an ante-nuptial agreement, and for partition and assignment of dower, is an incompetent witness against the heirs.

§ 15. **Interested third persons.**— One interested in the result of a suit which is in effect between the estates of two deceased persons, although brought against an executor individually because of her right to share in the estate of one of the deceased persons, cannot testify to facts equally within the knowledge of the other deceased person.¹ But the mother of an alleged illegitimate child has “no interest in the event” which makes her incompetent to testify to the fact of her marriage with the father, in an action by the son to enforce his claim as an heir of the father.² And in an action upon an alleged promise of a deceased person to pay for taking care of a bastard child of which he had been adjudged the father, the mother is not interested in the event of the action so as to be incompetent to testify as to a conversation between plaintiff and the deceased.³

§ 16. **Assignors, grantors, etc., of parties as witnesses.**— A person from whom a party to an action acquired his title or cause of action against the estate of a deceased person is incompetent as a witness for such party in respect to a transaction with the deceased person.⁴ Thus, a lessee and his assignee are not competent witnesses in an action by the assignee against the successors of the lessors, one of whom is deceased, to testify to matters which occurred in the life-time of the deceased lessor;⁵ and the person named as grantor in a deed is incompetent to prove that the deed is a forgery in a suit brought after the grantee's death against those claiming thereunder, though the entire transaction in which the alleged deed was given occurred in the absence of the deceased, and he was represented thereat by an agent who is living and is a competent witness.⁶

¹ Penny v. Croul (Mich.), 44 Alb. L. J. 225.

² Eisenlord v. Clum, 44 Alb. L. J. 66; 126 N. Y. 552; 38 N. Y. State Rep. 446.

³ Connelly v. O'Connor, 26 N. Y. State Rep. 840; 117 N. Y. 91.

⁴ Shields v. Smith, 104 N. C. 57; Sublett v. Hodges, 88 Ala. 491; Carey v. Carey, 104 N. C. 171.

⁵ Duffield v. Hue, 106 Pa. St. 602; Shaak v. Meily, id. 161.

⁶ Sutherland v. Ross, 140 Pa. St. 379.

§ 17. Heirs, legatees, distributees, etc., as witnesses.—

The testimony of one who appeared as a contestant of a will, as to personal transactions and communications with testator, is incompetent although she subsequently withdrew as a contestant, and also withdrew her appearance, where she had at all times appeared to desire the defeat of the will, and there is no proof whether her share under the will or in case of intestacy would be the more valuable.¹ Where the probate of a will is contested, legatees under it are not competent witnesses for the proponent as to personal transactions or communications between them and the testator. Where, however, a legatee has executed a valid release of all his interest, the disability is removed;² and the simple expression of dissent by the donee of a legacy of personal property, though only by parol, is sufficient to avoid the gift and render him competent as a witness upon the probate of the will.³ A beneficiary under and proponent of a will is not incompetent to testify to testatrix's declaring to the subscribing witness that it was her will, and that she went to her desk and signed it in the presence of the witness.⁴ A widow who claims as her own land of which her husband's heirs ask partition as belonging to him is not a competent witness in her own behalf.⁵ But an heir interested in an estate is competent, in an action by the administrator against the administrator of a deceased debtor to recover a debt due the estate, to testify to the handwriting of his ancestor in book entries.⁶

§ 18. Agents and representatives as witnesses.— The statute declaring parties to actions and persons interested in the event thereof incompetent to testify to conversations with, or admissions of, deceased persons relative to matters in issue is inapplicable to an agent not himself a party to the action or having any legal interest in it.⁷ But the cashier of a bank is not a disinterested witness whose testimony as to the transac-

¹ *Re Le Sax's Will*, 131 N. Y. 624; 45 N. Y. State Rep. 11; 17 N. Y. Supp. 43 N. Y. State Rep. 101. 669.

² *Loder v. Whelpley*, 111 N. Y. 239; ⁵ *Lancaster v. Blaney*, 140 Ill. 203. 19 N. Y. State Rep. 631; *Re Dunham's Will*, 31 id. 858; 131 N. Y. 575. ⁶ *Keener v. Zartman*, 144 Pa. St. 179.

³ *Re Berrien's Will*, 58 Hun, 610; 35 N. Y. State Rep. 255. ⁷ *Whitman v. Foley*, 125 N. Y. 657; 36 N. Y. State Rep. 133; *Darwin v.*

⁴ *Re Bernsee's Will*, 63 Hun. 628; *Keigher*, 45 Minn. 64.

tions conducted by him is to be regarded as controlling if not contradicted, where he was the financial agent of the bank and an owner of a large amount of its capital stock.¹ An administratrix who has resigned after commencing an action may be a witness for her successor, who has been substituted in her place, as to a transaction with or statement by the intestate of the defendant administrators.²

§ 19. Effect of prior evidence on other side.—An election to testify by an executor or representative who is a party to the suit is an exception to the competency of the testimony of the adverse party.³ But to render a party competent to testify to a personal transaction with a deceased person under whom his adversary claims, by testimony of the latter, regarding such a transaction, the two transactions must appear to be the same.⁴ A plaintiff's executor may testify simply to identify the account books of the deceased without admitting the defendant to testify generally in the case.⁵ A party is a competent witness in his own favor as to such matters as were testified to in a deposition of the adverse party taken in the latter's behalf, where he dies before trial, whether such deposition is or is not offered in evidence.⁶ The examination by the plaintiff of the defendant as to matters not prohibited by the statute concerning evidence of transactions with a deceased does not entitle the latter to testify as to personal transactions with the plaintiff's deceased ancestor as to matters involved in the action.⁷ And where a claimant against a decedent's estate makes the executrix his own witness, it does not make him competent to testify to the transaction where his testimony is otherwise incompetent.⁸

§ 20. What is not a personal transaction.—Testimony that a witness saw a person, since deceased, at a certain place,

¹ Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191; 42 Alb. L. J. 472; 33 N. Y. State Rep. 389.

² Snyder v. Fielder, 139 U. S. 479.

³ Wilcox v. Corwin, 117 N. Y. 500; Dow v. Merrill, 65 N. H. 107.

⁴ Brown v. Burgett, 61 Hun, 623; 40 N. Y. State Rep. 564; Re Roth's Estate, 150 Pa. St. 261.

⁵ Sheehan v. Hennessey, 65 N. H. 101.

⁶ Leahy v. Rayburn, 33 Mo. App. 55. But the contrary is held in Allen v. Chouteau, 101 Mo. 309.

⁷ Hopkins v. Bowers, 108 N. C. 298.

⁸ Herrington v. Winn, 60 Hun, 235; 38 N. Y. State Rep. 83; 14 N. Y. Supp. 612.

at a specified time, is not within the prohibition of the law. So the evidence of witnesses as to conversations between a deceased person and another, in which they state they took no part, is not made inadmissible by the fact that their testimony was pre-arranged so as to escape the statute.¹ And the owner of personal property is not incompetent to testify to its value in an action against an executor for its conversion by his testator.² But such witness is incompetent to testify as to the contents of a box in which the property converted was. Testimony that a person obtained a deed from a room in which were three persons, one of whom has since died, is not evidence of a personal transaction with the latter, though the deed was from him, when nothing is said as to any action by him or any conversation with him.³ But the payee of a note executed by a person since deceased is incompetent to testify in a suit thereon against the personal representatives of the decedent that the note was never paid.⁴ So in an action on account against the personal representatives of a decedent, the plaintiff's evidence is not competent to establish the correctness of his books of account, so as to make entries therein against the decedent admissible in evidence.⁵ Testimony of a defendant in an action to set aside as fraudulent as to creditors an assignment to him of a life policy by his brother, since deceased, as to what sums of money he paid to third persons on deceased's account, is not incompetent as testimony to a transaction between deceased and himself.⁶ And testimony of plaintiff in a suit upon a note against the estate of a deceased person, that she had the notes in her possession prior to and at the death of the decedent, is not inadmissible as relating to a personal transaction with the deceased;⁷ neither is a statement of one suing executors on a note which purported to have been executed by their testator, that she

¹ *Re Brown*, 59 Hun, 628; 38 N. Y. State Rep. 130; *Simonds v. Partridge*, 154 Mass. 500. *Hunt*, 38 id. 739; 60 Hun, 579; *Simpson v. Simpson*, 107 N. C. 552.

² *Gregory v. Fitchner*, 43 Alb. L. J. 517. ⁵ *Davis v. Seaman*, 64 Hun, 572; 46 N. Y. State Rep. 810.

³ *Greer v. Greer*, 58 Hun, 251; 34 N. Y. State Rep. 448. ⁶ *Watts v. Warren*, 108 N. C. 514; *Williams v. Mower*, 35 S. C. 206; *Brice v. Miller*, id. 537.

⁴ *McMurray v. McMurray*, 63 Hun, 483; 45 N. Y. State Rep. 2; *Meyer v.* ⁷ *Mortimer v. Chambers*, 63 Hun, 335; 43 N. Y. State Rep. 365.

has lost it;¹ nor are letters dictated by a person since deceased to his wife, to be transmitted by her to the person to whom they were addressed, and who contests his will.² And where it is proved that parties were induced by the representatives of a decedent to enter into a prejudicial agreement, proof of their state of mind as to belief in or reliance upon such representations is not incompetent.³ A personal transaction with a decedent includes the delivery of a deed by him, or proof that it was received from the postoffice bearing a post-mark indicating that it was transmitted by him.⁴

While of course it is not competent for a party, when called as a witness in his own behalf against one representing a deceased person, to testify affirmatively as to any transaction had personally with such deceased person, or whether a particular interview between them took place or not, unless his adversary is first examined in reference thereto, yet this does not necessarily exclude the evidence of the surviving party when it tends to negative or affirm the existence of such transaction or communication. The object and intent of the restriction placed upon the survivor of those engaged in personal dealings and transactions from giving evidence in relation thereto will be accomplished if it is limited to cases which preclude him from giving such evidence when it is offered for the purpose of establishing an affirmative cause of action or defense. It is difficult to lay down a rule which will cover all possible transactions; but it is safe to say when a party gives material evidence as to extraneous facts which may or may not involve the negative or affirmative of the existence of a personal transaction or communication with a deceased person, that the adverse party, although precluded from directly proving the existence of such communication or transaction, may give evidence of extraneous facts tending to controvert his adversary's proof, although those facts may also incidentally involve the negation or affirmation of such personal communications or transactions.

¹ Choate v. Huff (Tex. App.), 18 S. W. Rep. 87.

² Re Budlong's Will, 54 Hun, 131; 26 N. Y. State Rep. 863.

³ Hard v. Ashley, 28 N. Y. State Rep. 601; 117 N. Y. 606.

⁴ Howard v. Zimpleman (Tex.), 14 S. W. Rep. 59.

§ 21. *Illustrations.*—In *Wadsworth v. Heemans*¹ the plaintiff was allowed to ask of himself as a witness: “At the time you left those bonds in the safe was the name of Mr. Fellows in either of these indorsements?” and also, “Was the name of Joseph Fellows anywhere on those instruments?” In that case the court say: “We do not think the inquiry involved any personal transaction between Hill and Fellows. It respected merely the condition of the bonds. It neither affirmed nor negatived any personal transaction between the two. The insertion of his name in the blank might well have been the separate and independent act of Fellows, and not, in and of itself, a personal transaction between the two. We must enforce the rule fairly, but draw the line somewhere.” In *Saratoga Co. Bank v. Leach*² the defendant was shown the note in suit and asked: “Is the signature to this paper, marked ‘A,’ your signature?” In *Burrows v. Butler*³ a party was allowed to testify to the value of services which he rendered for decedent. The word “transaction” does not embrace all the occurrences which go to make up a cause of action, but only such as must have been communicated to the deceased person to give them effect. In *Denise v. Denise*,⁴ in an action to recover from the representatives of a deceased for board, etc., the plaintiff was asked: “From the date of your marriage to the 16th day of November, 1874, who provided the necessaries for the house and the support of the family?” and was allowed to answer: “We both did it; he got some things and I got the rest.” In that case the court say: “We do not think the question was open to the objection that it necessarily called for their version of transactions between herself and decedent. It does not really or by the ordinary construction involve a personal transaction between the plaintiff and the intestate. It is the statement of a fact of which the witness had knowledge, not a transaction between her and deceased.” In *Viall v. Leavens*⁵ it was held that a party could testify that she had the custody of the deed executed by deceased both before and after its acknowledgment and

¹ 85 N. Y. 639.

² 37 Hun, 336.

³ 38 Hun, 157.

⁴ 41 Hun, 9; 18 N. Y. State Rep. 876.

⁵ 39 Hun, 291.

down to the time of trial. In *Carroll v. Davis*¹ the plaintiff was allowed to state that he had examined the account-book of the deceased, which was shown to have been lost, and that he saw therein and read an entry in the handwriting of the deceased, and to state the contents. In *Sager v. Dorr*,² in an action for board furnished deceased, the defense was that deceased paid for household supplies in return for board. Plaintiff was allowed to testify that she paid for the supplies herself. In *Re Merchant's Estate*³ it was held that evidence of what a person did or did not apart from personal transactions with deceased was competent. So in *Gregory v. Fichture*,⁴ in an action for the conversion by decedent of a stock of goods, the plaintiff was allowed to testify as to its value. So in *Whetmore v. Peck*⁵ it was held that a physician's books were competent to show services to deceased, though relating to a personal transaction. In *Blaesi v. Blaesi*⁶ the defendant was allowed to answer the question: "Was there ever a deed in that desk from you to Wm. Blaesi?" Also, "Did you ever appear before Mr. Litz, the commissioner of deeds, or anyone else, to acknowledge a deed?" In *Redfield v. Stitt*⁷ the plaintiff was allowed to state that he had never seen the note in suit. In *Price v. Brown*⁸ the plaintiff was allowed to state that she had, at the time stated, in her possession the bonds in question. In *Sheil v. Muir*⁹ it was held that a plaintiff who was an attorney had a right to state the number of days he worked upon the case. In *Strough v. Wilder*¹⁰ it was held that a defendant could testify that he had occupied the property, rented it and collected the rents since 1855; also that he had been in possession of the deed since that time, and that the condition of the deed has been the same as it was at the time of the trial. In *Simmons v. Havans*¹¹ the plaintiff was allowed to testify that she had the deed in her possession and that the signature was in the hand-

¹ 9 Abb. N. C. 60.

² 51 Hun, 642; 21 N. Y. State Rep. 635.

³ 3 N. Y. Supp. 875.

⁴ 38 N. Y. State Rep. 192; 14 N. Y. Supp. 891.

⁵ 19 Alb. L. J. 400.

⁶ 15 N. Y. State Rep. 672.

⁷ 10 N. Y. State Rep. 367.

⁸ 112 N. Y. 677; 5 N. Y. State Rep. 9.

⁹ 22 N. Y. State Rep. 829.

¹⁰ 119 N. Y. 530; 22 N. Y. State Rep. 481.

¹¹ 101 N. Y. 427.

writing of her mother. In *Wing v. Bliss*¹ it was held that a party could testify that he had seen deceased write; that the letter, check and envelope were in the deceased's handwriting, and that on a certain day he found all these papers on his table. In *Hard et al. v. Ashley et al.*² it was held that, where it was shown that a decedent made certain representations to a party to an action, such party may testify as to whether those representations were believed in and relied upon by him when the agreement in suit was made; that it was a fact which the deceased could not have known or testified to himself.

Where a person brings an action to recover land owned by a person deceased, whom the plaintiff claims was his father, his mother is a competent witness to prove a marriage between herself and the decedent. Such witness is not interested in the event of the action by reason of her right to dower if the marriage is established. The witness has no other interest in the case than that which grows out of her right of dower in the premises, and as to that the verdict in the case would be no evidence in a suit to be brought by her for the recovery of her dower, and hence she has but an interest in the question, and not in the event of the action.³

¹ 55 Hun, 603; 28 N. Y. State Rep. 198.

³ *Eisenlord v. Clum*, 126 N. Y. 552; 38 N. Y. State Rep. 446.

² 117 N. Y. 606; 28 N. Y. State Rep. 601.

CHAPTER VI.

JUDICIAL NOTICE.

<p>I. OF WHAT MATTERS COURTS WILL TAKE JUDICIAL NOTICE.</p> <p>§ 1. In general.</p> <p>2. Public acts — What are.</p> <p>3. Common experience.</p> <p>4. Charters, private statutes, etc.</p> <p>5. Law of nations.</p> <p>6. Matters taken notice of.</p> <p>7. Matters not taken notice of.</p>	<p>§ 8. Official character, acts, duties, etc.</p> <p>9. Political divisions and geographical matters.</p> <p>10. Statutes of other states.</p> <p>11. Statutes as ground of action or defense.</p> <p style="text-align: center;">II. RAILROADS.</p>
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I. OF WHAT MATTERS COURTS WILL TAKE JUDICIAL NOTICE.

§ 1. **In general.**— There are certain matters of which courts will take judicial notice without putting parties to the trouble and expense of proving them.¹ All civilized nations, being alike members of the general family of sovereignties, may well be supposed to recognize each other's existence and general public and external relations. The public tribunals and functionaries of every nation take notice of the existence and titles of all the other sovereign powers in the civilized world, their respective flags, and their seals of state. Public acts, decrees and judgments, exemplified under this seal, are received as true and genuine, it being the highest evidence of their character.² Courts must take judicial notice of a treaty with a foreign government.³ The courts of the United States take judicial notice of all the public statutes of the several states,⁴ and the decision of the highest court of a state as to the constitutionality of a state statute.⁵ Courts will take judicial notice of the kind of currency in use; that gold is a legal tender; and of the value of American coin.⁶

¹ *Brenner v. Atlantic Dredging Co.*, 134 N. Y. 156; 46 Alb. L. J. 64; 45 N. Y. State Rep. 774.

⁴ *Gormley v. Bunyan*, 138 U. S. 623; *Re Jordan*, 49 Fed. Rep. 238.

² *Coit v. Milliken*, 1 Denio, 376; *Church v. Hubbard*, 2 Cranch, 187.

⁵ *Knox v. Columbia Liberty Iron Co.*, 42 Fed. Rep. 378.

³ *Ex parte McCabe*, 46 Fed. Rep. 363.

⁶ *Dailey v. State*, 10 Ind. 536; *Grant v. State*, 89 Ga. 393.

§ 2. **Public acts — What are.**— Our courts take judicial notice, without proof, of all public acts of the state, the same as if their provisions had been set out in the pleadings;¹ but private acts, or acts that are confined in their operation to a few persons and have no general application or effect, must, if relied upon, be set forth in the pleadings and proved upon the trial, the same as any other fact.² Thus the courts cannot judicially know the ordinances of a city.³ Acts which affect public rights, as acts giving authority to individuals or corporations to make erections or improvements in public navigable streams which affect the rights of navigation, fishery, or any common public right, will be regarded as public acts, although not specially made so in the act itself; and the courts take judicial notice of a charter when declared by the legislature to be a public act.⁴ A special act of the legislature, extending the jurisdiction of a certain town constable throughout the county or state, is such an act as courts are bound to notice without proof;⁵ and courts must take judicial notice of the federal statute creating courts in the territories and defining their jurisdiction.⁶ So of an act under which a person claims the office of a judge of a particular court.⁷ So of an act for the protection of fish in a certain river.⁸ So where an act, otherwise private and local, contains provisions that are public and general, the act, although partly local and partly public, will be deemed a public act, which need not be pleaded or proved.⁹ Where a right, privilege or duty is given or imposed upon any person, natural or artificial, by a public act, the courts will take judicial notice thereof.¹⁰ It has been held that although an act may affect very many persons, yet, if it

¹ Newark v. Stout, 52 N. J. L. 35;
Thayer v. Boyd, 31 Neb. 682.

⁵ Levy v. State, 6 Ind. 281.

⁶ Coughran v. Gilman, 81 Iowa,

² Bowe v. City of Kansas, 51 Mo. 442.
454.

⁷ Burns v. Bloedel, 42 N. Y. State Rep. 453; Clark v. Com., 29 Pa. St. 129.

³ Charleston v. Ashley Phosphate Co., 34 S. C. 541; Central Sav. Bank v. Baltimore, 71 Md. 515; Kean v. Klausman, 21 Mo. App. 485; McDonald v. Lane, 80 Ga. 497.

⁸ Burnham v. Webster, 5 Mass. 266.

⁹ People v. McCann, 16 N. Y. 61;

Williams v. People, 24 id. 407.

⁴ Case v. Kelly, 133 U. S. 21;
Burbridge v. Kansas City C. R. Co.,
36 Mo. App. 669.

¹⁰ Tillman v. Coosaw Min. Co., 45 Fed. Rep. 804.

is not equal and general in its application to all in the state or locality to which it relates, it is a private act; but if it is general in its effect and applies equally to all within the locality to which it relates, it is a public act of which the court will take judicial notice. Yet, whenever a purely private act provides in certain events a forfeiture to the government, or in the case of a corporation that the government in a certain contingency may take the property, they are deemed public acts. And indeed all acts which in any wise concern the government or any of its co-ordinate branches may be said to be public. So of all acts in amendment of acts declared public by the terms of the original act.¹ The courts will take judicial notice of the general laws under which a corporation was organized, and the liabilities and responsibilities to which a stockholder is thereby subjected.² In short, the court takes judicial notice of and determines for itself the law;³ but the courts of one state cannot take judicial notice of the statutes of another state.⁴ The public proclamations made by the president have the force of public law, of which courts are bound to take notice.⁵ The same rule applies to the official messages of the executive,⁶ and the official journals of the houses of the general assembly,⁷ and of a census taken under authority of the state or of the United States.⁸

§ 3. Common experience.— Courts take judicial notice of all matters that are part of the experience and common knowledge of the day;⁹ as of the meaning of the word "whisky;"¹⁰ the customary abbreviations of Christian names;¹¹ that the usual and appropriate symbols of nationality and sovereignty are the national flag and seal; that certain prov-

¹ *Bank of Utica v. Smedes*, 3 Cow. 684.

² *Bosley v. National Mach. Co.*, 123 N. Y. 550; 34 N. Y. State Rep. 277.

³ *Norman v. Kentucky B'd of Man. of World's Fair Col. Expo.*, 47 Alb. L. J. 190.

⁴ *Chipman v. Peabody (Mass.)*, 34 N. E. Rep. 563; *Sammis v. Wightman*, 31 Fla. 10.

⁵ *Jenkins v. Collard*, 145 U. S. 546.

⁶ *Wells v. Missouri P. R. Co. (Mo.)*, 19 S. W. Rep. 530.

⁷ *Barnard v. Gall*, 43 La. Ann. 959.

⁸ *Adams County v. Cunningham*, 81 Wis. 440; *People v. Wong Wang*, 92 Cal. 277.

⁹ *Cox v. Syenite Granite Co.*, 39 Mo. App. 424; *Pacific Exp. Co. v. Seibert*, 44 Fed. Rep. 310; *Seamen v. Koehler*, 122 N. Y. 646.

¹⁰ *Frese v. State*, 23 Fla. 267.

¹¹ *State v. Senn*, 32 S. C. 392.

inces are in a foreign country, and that they have governments and courts, and that their courts proceed according to the common law;¹ and that the public acts, decrees and judgments exemplified under their seal are true and genuine. If, however, upon civil war in any country, one part of the nation shall separate itself from the other and establish for itself an independent government, the newly-formed nation cannot without proof be recognized as such by the courts of other nations until it has been acknowledged by the sovereign power under which those courts are constituted.² The first act of recognition belongs to the executive function; but though the seal of the new power, prior to such acknowledgment, is not permitted to prove itself, yet it may be proved as a fact by other competent testimony. The courts will take judicial notice of the existence of such province, whether it has been recognized by the government under whose jurisdiction it acts or not.³ The courts take judicial notice of wars in which their government is engaged, whether domestic or foreign;⁴ but not of articles of war unless published under authority of the government.⁵ They take notice of the legal weights and measures.⁶ The courts of the United States take judicial notice of the ports and waters of the United States in which the tide ebbs and flows; of the situation of a port in a foreign country, and what impediments, if any, exist at its entrance, and whether vessels of a certain draft can enter it; where the principal rivers of the state lie, and what towns they lie in;⁷ of the geographical position of falls on public navigable rivers, and whether there are or are not pilots appointed on it.⁸ Judicial notice will be taken of the provisions of a city charter which is made a public act.⁹

§ 4. **Charters, private statutes, etc.**—As a general rule, charters of municipal corporations are held to be public acts, whether so declared in the act creating them or not, and need

¹ *Lazier v. Wescott*, 26 N. Y. 146.

⁶ *United States v. Burns*, 5 McLean,

² *United States v. Palmer*, 3 Wheat. 23.

610.

⁷ *City Council of Montgomery v. M. & W. Plank-road Co.*, 31 Ala. 79.

³ *Taylor v. Barclay*, 2 Simms, 213.

⁸ *Butcher v. Brownville*, 2 Kan. 70.

⁴ *Dolder v. Huntingfield*, 11 Ves.

292.

⁹ *Burfenning v. Chicago, St. Paul,*

⁵ *Rex v. Withers*, 5 T. R. 442.

M. & O. R. Co., 46 Minn. 20.

not be alleged in the pleadings, or proved on the trial, in actions where the provisions of such charters become material.¹ But where municipal corporations are formed under a general law, their organization and all the legal steps requisite to perfect their organization must be proved. So where, by the terms of the charter, the question of acceptance is submitted to the people, its acceptance by them must be duly alleged and proved.² By-laws of a municipal corporation are private acts and will not be judicially noticed. But city courts or courts of municipal corporations will take judicial notice of its ordinances.³ Charters of private corporations are private acts unless made public by the terms of the act creating them.

§ 5. **Law of nations.**—The public tribunals of all civilized nations take notice of the law of nations and the general customs and usages of merchants. Foreign admiralty and maritime courts, also, being the courts of the civilized world, and of co-ordinate jurisdiction, are judicially recognized everywhere; and their seals need not be proved.⁴

§ 6. **Matters taken notice of.**—Courts will judicially take notice of a general custom of merchants throughout the state,⁵ or one so universal and general that persons are presumed to know of it;⁶ and of the law merchant;⁷ and of commercial usage as to the days *dies non*, as Sundays and Christmas;⁸ and of public history affecting the whole state or people;⁹ as to the existence of a civil war in the country or that a certain college is a national institution; as to the history of a country; the places where courts are or formerly have been held therein, and as to the time when said courts were held, and when the change in the place or time of the holding of courts was made;¹⁰ and that it has adopted town-

¹ Case v. Kelly, 133 U. S. 21; State v. Sherman, 42 Mo. 210; Case v. Mobile, 30 Ala. 538; Letier v. Oskaloosa, 41 Iowa, 353.

² Johnson v. Common Council, 16 Ind. 227.

³ Moundsville v. Velton, 35 W. Va. 217.

⁴ Story on Conf. of Laws, § 643; Croudson v. Leonard, 4 Cranch, 435.

⁵ Smith v. Miller, 43 N. Y. 171; Bronson v. Wiman, 8 id. 182.

⁶ McKinnon v. Bliss, 21 N. Y. 206.

⁷ Jewell v. Centre, 25 Ala. 498.

⁸ Sassur v. Farmers' Bank, 4 Md. 409.

⁹ Swinerton v. Columbia Ins. Co., 37 N. Y. 174; Woods v. Wilder, 43 id. 164; Stokes v. Macken, 62 Barb. 145; Rice v. Shook, 27 Ark. 137.

¹⁰ Ross v. Austell, 2 Cal. 183; Robertson v. Teal, 9 Tex. 344.

ships, and when;¹ of who are public officers of the state, executive or judicial, and of any changes therein; the time when their term of office commenced, and when it ended; also of the genuineness of their signatures;² as who is governor;³ and of appointments made by him under the laws;⁴ of who are justices of the peace in the county where the court is held and the genuineness of their signatures.⁵ Courts take judicial notice of proclamations appointing days of fast and prayer, or thanksgiving;⁶ they will also take notice of a statement in a report of the commissioners of railroads;⁷ and that books known as "plat books" are, and have been for many years, kept by county recorders, in which plats of towns, cities and additions are recorded.⁸ Courts take notice of general elections;⁹ and who are elected to fill certain offices, when their term begins, when it ends, and of all changes therein, and of the genuineness of their signatures;¹⁰ that primary elections have grown to be an essential part of the political system.¹¹ The seal of a notary public is also judicially taken notice of by the courts, he being an officer recognized by the whole commercial world.¹² So are notarial certificates, as proof of presentation and non-payment;¹³ so of foreign treaties with our national government.¹⁴ Courts will take judicial notice of things which must happen according to the ordinary course of nature;¹⁵ as the time when the sun rises and sets during different days and seasons;¹⁶ of the days of the week on which particular days of the month fall;¹⁷ that a particular date fall on Sunday.¹⁸ Courts are bound to take notice of the

¹ *Rock Island v. Steel*, 31 Ill. 543.

¹⁰ *Wells v. Jackson*, 47 N. H. 235;

² *People v. Johr*, 22 Mich. 461; *Ex parte Patterson*, 33 Ala. 74.

Heizer v. State, 12 Md. 330.

¹¹ *State v. Hirsch (Ind.)*, 42 Alb.

³ *Wells v. Jackson, etc. Co.*, 47 N. H. 235.

L. J. 197.

⁴ *State v. Evans*, 8 Humph. (Tenn.) 110.

¹² *Chanoine v. Fowler*, 3 Wend. 173; *Bayley on Bills*, 515.

⁵ *Graham v. Anderson*, 42 Ill. 514.

¹³ *Pierce v. Indseth*, 106 U. S. 546.

⁶ *People v. Ackermen*, 80 Mich. 588.

¹⁴ *Lacroix v. Sarrazin*, 15 Fed. Rep. 489.

⁷ *Cincinnati W. & B. R. Co. v. Hoffhines*, 46 Ohio St. 643.

¹⁵ *Rex v. Luffe*, 8 East, 202.

⁸ *Miller v. Indianapolis*, 123 Ind. 196.

¹⁶ *People v. Chuquee*, 61 Cal. 404.

¹⁷ *Reid v. Wilson*, 41 N. J. L. 29.

⁹ *Rice v. Mead*, 22 How. Pr. 445.

¹⁸ *Bar Harbor F. Nat. Bank v. Kingsley*, 84 Me. 111; *McIntosh v. Lee*, 57 Iowa, 356; *Campbell v. West*,

elementary laws of gravitation;¹ that natural gas is a dangerous agency;² also electricity and its properties, and the fact that it is not a commodity which can be bought in the market and transported from place to place;³ that it is the custom in cities to construct vaults under sidewalks in front of business blocks.⁴ Courts will take judicial notice of the official acts of an alderman;⁵ of the repeal of an act incorporating a town;⁶ of the suspension of a public statute; of matters of public history; of the history of the state and its topography and condition;⁷ of the contents of the Bible, and that the religious world is divided into sects, and of the general doctrine maintained by each sect;⁸ of the meaning of the word "whisky;"⁹ that the term "beer," in the absence of all evidence as to its quality and effect, does not import an intoxicating beverage, and that it is a fermented liquor;¹⁰ that beer is a malt liquor, and that the stronger kinds, as ale, porter and strong beer, are of an intoxicating character.¹¹ Hitherto the courts have not been willing to take notice that lager beer is intoxicating, but have submitted the question, when controverted, to the jury, to be determined upon the evidence.¹² The court takes judicial notice that brandy is intoxicating;¹³ of the customary abbreviation of christian names;¹⁴ that telephones have become an ordinary medium of communication and interchange of thought;¹⁵ that electricity, as used by a street railway company for the propulsion of its cars, is dangerous;¹⁶ of the height of the human

86 Cal. 197; *Swales v. Grubbs*, 126 Ind. 106.

¹ *Cox v. Syenite Granite Co.*, 39 Mo. App. 424.

² *Jamieson v. Indiana Natural Gas Co.*, 128 Ind. 555; 44 Alb. L. J. 145.

³ *Crawfordville v. Braden*, 130 Ind. 149.

⁴ *Babbage v. Powers*, 130 N. Y. 281; 41 N. Y. State Rep. 521.

⁵ *Fox v. Com.*, 81 Pa. St. 511.

⁶ *Belmont v. Morrill*, 69 Me. 314.

⁷ *Wilson v. State*, 54 Ind. 553.

⁸ *Weiss v. Edgerton School Board* (Wis.), 41 Alb. L. J. 452.

⁹ *Frese v. State*, 23 Fla. 267.

¹⁰ *Blatz v. Rohrbach*, 116 N. Y. 450; 41 Alb. L. J. 90; 27 N. Y. State Rep. 484.

¹¹ *Rau v. People*, 63 N. Y. 277.

¹² *Blatz v. Rohrbach*, 27 N. Y. State Rep. 484; 116 N. Y. 450.

¹³ *State v. Effinger*, 44 Mo. App. 81.

¹⁴ *State v. Senn*, 32 S. C. 392.

¹⁵ *Globe Printing Co. v. Stahl*, 23 Mo. App. 451.

¹⁶ *Taggart v. Newport Street R. Co.*, 41 Alb. L. J. 416.

body and the measurements of its several parts;¹ of the course of business in the country and of new processes of practical utility in facilitating trade;² of the course of seasons of husbandry;³ of the functions of town officers under the statute;⁴ and of common epithets which are generally understood;⁵ that a very large interstate trade exists in fresh-dressed meat;⁶ that two railroads, if completed according to their charter, would form a continuous line;⁷ of the facilities for public travel between different points, the great lines of public travel and their connections;⁸ of the resignation or coming in of public officers;⁹ that the state and township are political bodies;¹⁰ of the jurisdiction of courts of the state and of the United States, and of the acts giving it;¹¹ that the business of selling proprietary medicines and nostrums depends more upon the expedients employed to recommend them to the public than the merits of the medicine;¹² of the nature and uses of an air gun, and that it is harmlessly sold and used as a toy;¹³ of the duties imposed upon persons or officers by state and national law respecting particular matters;¹⁴ of constitutions of other states and powers thereby given to courts;¹⁵ that names are foreign to the country and to the English language;¹⁶ of the functions of such railway officers as ticket agents and conductors; that the abbreviation "supt." stands for the word "superintendent," and that a superintendent is a managing agent;¹⁷ that the driver of a street-car is subject to the conductor's orders;¹⁸ of the cost of building and run-

¹ *Hunter v. New York, Ontario & Western R. Co.*, 116 N. Y. 615; 27 N. Y. State Rep. 729.

² *Richards v. Michigan C. R. Co.*, 40 Fed. Rep. 165.

³ *Ross v. Boswell*, 60 Ind. 235.

⁴ *Ingles v. State*, 61 Ind. 212.

⁵ *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251.

⁶ *Re Rebman*, 41 Fed. Rep. 867.

⁷ *Georgia P. R. Co. v. Gaines*, 88 Ala. 377.

⁸ *Morgan v. Farrel*, 58 Conn. 413; *Maghee v. Camden & Amboy R. Co.*, 45 N. Y. 514; *Manning v. Gasparie*, 27 Ind. 399.

⁹ *Ex parte Peterson*, 33 Ala. 74.

¹⁰ *Le Grange v. Chapman*, 11 Mich. 499.

¹¹ *Bretz v. Mayor, etc.*, 6 Rob. (N. Y.) 326.

¹² *Fowlé v. Park*, 48 Fed. Rep. 789.

¹³ *Harris v. Cameron*, 81 Wis. 239; 45 Alb. L. J. 320.

¹⁴ *Semple v. Hogar*, 27 Cal. 163.

¹⁵ *Butcher v. Brownville*, 2 Kan. 70.

¹⁶ *Behrensmeyer v. Kreitz*, 135 Ill. 591.

¹⁷ *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360.

¹⁸ *Seaman v. Koehler*, 122 N. Y. 646; 33 N. Y. State Rep. 729.

ning railroads in different places;¹ of the course of business of railroad companies to transfer cars over more than one railroad without breaking bulk;² and of the rules and regulations of a railroad company;³ that public streets in cities are public highways; that municipal corporations have power to improve streets;⁴ of the time required for steam passage across the Atlantic;⁵ that coal oil is an inflammable liquid;⁶ that labor on six days of the week has not been regarded by any religious body as a required religious observance, like that of rest on the seventh only;⁷ that the Indian Territory is a grazing country where cattle in great numbers run at large;⁸ of the coincidence of the days of the week and month;⁹ of the area of a county and the towns of which it is composed;¹⁰ of what lands are held by the general government in the state;¹¹ of the terms of court in the state, their commencement and close;¹² of the boundaries of the state;¹³ of all agreements in reference thereto;¹⁴ and of all changes therein;¹⁵ of the counties¹⁶ and municipal corporations;¹⁷ of the distance between the principal cities of the country, and of the time required for railway trains to run to and from them;¹⁸ which of the streams, if any, in the state are tidal streams;¹⁹ of what states joined the Confederacy;²⁰ of the disturbed condition of business in war times;²¹ of authority given to a county to subscribe for railroad stock; of the different classes of notes and bills in circulation as money at a particular time;²² of a

¹ *Wellman v. Chicago & I. R. Co.*, 83 Mich. 592.

² *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312.

³ *Highland Ave. & B. R. Co. v. Walters (Ala.)*, 8 S. Rep. 357.

⁴ *Murray v. Titcomb*, 19 Ind. 135.

⁵ *Oppenheim v. Wolf*, 3 Sandf. Ch. 571.

⁶ *Moseley v. Vermont Mut. F. Ins. Co.*, 55 Vt. 142.

⁷ *Re King*, 41 Fed. Rep. 905; 44 Alb. L. J. 309.

⁸ *Gulf, C. & S. F. R. Co. v. Washington*, 4 U. S. App. 121; 49 Fed. Rep. 347.

⁹ *Sprawl v. Lawrence*, 33 Ala. 106; *Mechanics' Bank v. Gibson*, 7 Wend. 460.

¹⁰ *Kidder v. Blaisdell*, 45 Me. 461.

¹¹ *Lewis v. Harris*, 31 Ala. 689.

¹² *Belthone v. Hale*, 45 Ala. 522; *McGinness v. State*, 24 Ind. 500.

¹³ *State v. Dunwall*, 3 R. I. 480.

¹⁴ *Thomas v. Stigers*, 5 Pa. St. 480.

¹⁵ *Ham v. Ham*, 39 Me. 263; *Ross v. Riddick*, 2 Ill. 73.

¹⁶ *People v. Snyder*, 41 N. Y. 397.

¹⁷ *Chapman v. Willer*, 6 Hill, 475.

¹⁸ *Clair v. Chicago, B. & Q. R. Co. (Iowa)*, 45 N. W. Rep. 470; *Pearce v. Laughfit*, 101 Pa. St. 507.

¹⁹ *Walker v. Allen*, 72 Ala. 456.

²⁰ *Danthitt v. Stinson*, 63 Mo. 268.

²¹ *Foscue v. Lyon*, 55 Ala. 440.

²² *Hart v. State*, 55 Ind. 599; *Lumpkin v. Murrell*, 46 Tex. 51.

previous financial depression;¹ when the Rebellion was terminated;² of the accession of the chief executive of the nation or state; under whose authority they act; his powers and privileges;³ the genuineness of his signature; the heads of departments and principal officers of state, and the public seals;⁴ the election or resignation of a senator of the United States; the appointment of a cabinet or foreign minister; also of public proclamations of war and peace;⁵ stated days of general political elections; the sittings of the legislature, and its established and usual course of proceeding; the privilege of its members. The courts also take judicial notice of the geography of the state and the enumeration of the inhabitants taken pursuant to law,⁶ and of the length of time ordinarily required to complete an enumeration of the inhabitants in a state;⁷ of the number of newspapers or of the fact that a newspaper is published;⁸ of the ordinary meaning of all words in our own tongue;⁹ such abbreviations and symbols of ideas as have, from immemorial use, been adopted by the people generally;¹⁰ of the mortality tables showing the natural expectancy of duration of life at a given age.¹¹

§ 7. **Matters not taken notice of.**—Courts will not take judicial notice of local customs, or the meaning of devices used in a particular trade, and the same must be proved;¹² they will not generally take notice of historical facts.¹³

§ 8. **Official character, duties, acts, etc.**—Courts will take judicial notice of who, from time to time, presides over the patent office, or other executive or judicial department of the government, even for a temporary purpose;¹⁴ who are elected sheriffs; the time when their term of office commences

¹ Ashley v. Martin, 50 Ala. 537.

⁹ Nix v. Hedden, 149 U. S. 304.

² Turner v. Patton, 48 Ala. 406.

¹⁰ Powers v. Bowdle (N. D.), 54 N.

³ Lindsey v. Attorney-General, 33 Miss. 508; State v. Williams, 5 Wis. 308.

W. Rep. 404; Toplitz v. Hedden, 146 U. S. 252.

⁴ Rex v. Jones, 2 Camp. 121.

¹¹ Kansas City, M. & B. R. Co. v. Phillips (Ala.), 12 S. Rep. 68.

⁵ Dalder v. Huntingfield, 11 Ves. 292.

¹² Johnson v. Robertson, 31 Md. 416; Harsh v. North, 40 Pa. St. 241.

⁶ Parker v. State, Powell (Ind.), 32 N. E. Rep. 836.

¹³ McKinnon v. Bliss, 21 N. Y. 206.

⁷ People v. Rice, 135 N. Y. 473.

¹⁴ York & M. L. R. Co. v. Winans, 17 How. (U. S.) 30.

⁸ Atkeson v. Lay (Mo.), 48 Alb. L. J. 89.

and when it ends, and the genuineness of their signatures. The court will take judicial notice that the county clerk is *ex officio* clerk of the superior court.¹ The United States courts take judicial notice of official statements made by the head of one of the branches of the executive department which relate to the public records under his control.² The circuit court of one county is bound to take judicial notice as to whether or not one signing an execution issued by a circuit court of another county is in fact clerk of the latter court.³ The courts are bound to take judicial cognizance of their own decisions and of facts which were proved in such decisions.⁴ In a suit for damages resulting from an accident, a fact proved and bearing on a subsequent case growing out of the same cause will be noticed in the latter case, where the testimony is reticent on the point.⁵ The United States supreme court takes judicial notice of the fact that at the date of his certificate a deputy controller of the currency was such officer.⁶ The court will take judicial notice that an officer before whom an affidavit was made is a justice of such court;⁷ that a certain person is an attorney, and of the genuineness of his signature connected with professional acts done by him, but not in cases in which he is himself a party;⁸ also of what attorneys have appeared in a cause;⁹ who are executive and judicial officers of the United States, elected or appointed in pursuance of the constitution or laws of congress.¹⁰

§ 9. **Political divisions and geographical matters.**— All courts are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings.¹¹

¹ Campbell v. West, 86 Cal. 197.

² Heath v. Wallace, 138 U. S. 573.

³ White v. Rankin, 90 Ala. 541.

⁴ Paland v. Chicago, St. L. & N. O. R. Co., 42 La. Ann. 290.

⁵ Paland v. Chicago, St. L. & N. O. R. Co., 42 La. Ann. 290.

⁶ Keyser v. Hitz, 133 U. S. 138.

⁷ Re Gorry, 48 Hun, 29; 15 N. Y. State Rep. 315.

⁸ Masterson v. Le Clair, 4 Minn. 163; People v. Nevins, 1 Hill, 154.

⁹ Symmes v. Maor, 21 Ind. 443.

¹⁰ York & M. L. R. Co. v. Winans, 17 How. (U. S.) 30.

¹¹ Jones v. United States, 137 U. S. 202.

They also take notice of the population of political divisions;¹ the names of all the counties in the state and their corporate character;² the organization of the counties and of the dates of such organization;³ that a certain portion of a certain section of public lands was selected by the governor of the state and patent therefor issued to the state by the secretary of the interior;⁴ that a place at which an offense was committed is within its jurisdiction;⁵ that a certain town or village is the county seat of a certain county;⁶ of the boundaries of a county and of the location of lands described by government subdivisions, as by township, range and section, and the legal subdivisions thereof;⁷ the general situation of a city with reference to the county lines within which it is situated;⁸ that a street is in a certain part of a city;⁹ the relative distances from a certain place to another part of the same state and the neighboring states;¹⁰ the existence of all villages and cities organized under the general incorporation act;¹¹ the size and class of cities;¹² that at a certain time a section of country was unsettled;¹³ what rivers are public highways.¹⁴ State courts take notice of the United States government surveys within the state, and of the location and relative situation of the lands officially surveyed and mapped out under the authority of the laws enacted by congress.¹⁵ The United States courts will take judicial notice that the United States, for revenue purposes, is divided into districts with certain geographical boundaries.¹⁶ The courts will take judicial notice

¹ Mertz v. Brooklyn, 128 N. Y. 617; 33 N. Y. State Rep. 577.

² Camp v. Marion County, 91 Ala. 240.

³ Pitts v. Lewis, 81 Iowa, 51; Ellsworth v. Nelson, id. 57.

⁴ Lasher v. State, 30 Tex. App. 387; State ex rel. Schumacher v. Gramelspacher, 126 Ind. 398.

⁵ Hayes v. Com. (Ky.), 14 S. W. Rep. 833.

⁶ Cole v. Segraves, 88 Cal. 103.

⁷ Campbell v. West, 86 Cal. 197.

⁸ Forehand v. State (Ark.), 13 S. W. Rep. 728.

⁹ Walsh v. Missouri P. R. Co., 102 Mo. 589.

¹⁰ Jamison v. Indiana Natural Gas Co., 128 Ind. 555; 44 Alb. L. J. 145.

¹¹ Rock Island v. Cuinely, 26 Ill. App. 173; 126 Ill. 408.

¹² Savannah v. Dickey, 33 Mo. App. 522; Byron v. Page (Utah), 23 Pac. Rep. 761.

¹³ United States v. Wallament V. & C. M. Co., 42 Fed. Rep. 351.

¹⁴ Com. v. King, 150 Mass. 221.

¹⁵ Knabe v. Burden, 88 Ala. 436; Peck v. Sims, 120 Ind. 345.

¹⁶ United States v. Jackson, 104 U. S. 41.

that a certain city is in a specified county; that a certain town is in a certain county;¹ that certain places constitute the chief cities or commercial centers of the state.²

§ 10. **Statutes of other states.**—In the absence of allegations or proof to the contrary, courts will assume that the laws of another state or country are similar to those in the state in which the action is tried.³ This rule does not extend to laws imposing a penalty or forfeiture.⁴ The judgment of a court of a foreign country, properly authenticated by the clerk of the court in which it was rendered and duly certified by the secretary of state, and of the governor of the province with the provisional seal, will be treated as evidence,⁵ and the courts will not take judicial notice of the statutes or common law of another state, and any person relying upon such statute or common law of another state must prove them, as any other fact is proved.⁶ But where an action is brought upon the judgment of another state, courts will take judicial notice of the laws of such state so far as relates to the judgment.⁷ They will take judicial notice of the laws of such other state so far as is necessary to determine the validity of the acts alleged to be in conformity with them.⁸ So when the statutes of another state upon a particular matter have been made the subject of a judicial decision in a state, the courts of such state will take judicial notice of it.⁹ The United States courts are presumed to know the laws of the several states, and will take judicial notice thereof.¹⁰ State courts take judicial notice of all public acts of congress, and pamphlets issued by government containing them may be read,¹¹ and all treaties made with foreign

¹ *People v. Wood*, 43 N. Y. State Rep. 293; 131 N. Y. 617; *Linck v. Litchfield* (Ill.), 31 N. E. Rep. 123; *State v. Clark First Nat. Bank* (S. D.), 51 N. W. Rep. 780; *Coulter v. Stafford*, 48 Fed. Rep. 266.

² *Texas Standard Cotton-oil Co. v. Adoue*, 83 Tex. 650; 45 Alb. L. J. 476.

³ *Stokes v. Macken*, 63 Barb. 145; *Simms v. Express Co.*, 38 Ga. 129; *Temple v. Hagar*, 27 Cal. 163; *Bemis v. McKenzie*, 13 Fla. 553.

⁴ *Cutler v. Wright*, 22 N. Y. 472; *Hull v. Augustine*, 23 Wis. 383.

⁵ *Lazier v. Westcott*, 26 N. Y. 146.

⁶ *Witascheck v. Glass*, 46 Mo. App. 209; *Stokes v. Macken*, 61 Barb. 145.

⁷ *Paine v. Schenectady Ins. Co.*, 11 R. I. 411.

⁸ *Carpenter v. Dexter*, 8 Wall. 513.

⁹ *Graham v. Williams*, 21 La. Ann. 594.

¹⁰ *Re Jordan*, 49 Fed. Rep. 238; *Jones v. Hays*, 4 McLean, 521.

¹¹ *Benner v. Atlantic Dredging Co.*, 34 N. Y. 156; 46 Alb. L. J. 64; 45 N. Y. State Rep. 774; *Buchanan v. Whitman*, 36 Ind. 257.

governments, and of the power of the president under the same.¹ When the statute of another state has been incorporated into an act of congress, it will be recognized without other proof.²

§ 11. **Statutes as ground of action or defense.**— If a party relies upon a statute either as a ground of action or defense, he must, notwithstanding the fact that it is a public statute of which the courts take judicial notice, set forth in his pleading such facts as bring him clearly within the provisions of the statute, or if in defense, where no special plea is required, show such state of facts as brings his case within the statute; and if there are many exceptions or provisos in the act, he must show negatively that the matter pleaded is not within the provisos or exceptions, unless the proviso or exception is in a subsequent substantive clause or statute, and is not connected with the enacting clause by any word of reference, in which case it is a matter of defense for the other party and need not be negatived in the pleadings.³ Where the enacting clause of a statute makes an exception to the general provisions of the act, a party pleading the provisions of the statute must negative the exception; but when the exception is contained in the proviso and not in the enacting clause, the party pleading the statute need not negative the exception. It is for the other party to set it up in avoidance of the other provisions of the statute.⁴ When a statute gives a remedy where none existed at common law, or where it makes an act lawful which is not so regarded at common law, the party must state in his pleadings and show upon the trial such a state of facts as brings his case clearly within the provisions of the statute as well as all the amendments thereto. But where the statute is only declaratory of a common-law right and in aid thereof, unless it in some way varies the standing or rights of parties in court, the statute, or any circumstance bringing the party within the provisions thereof, need not be stated in the pleadings; but otherwise when the statute gives any rights additional to the common-law rights, or varies or changes the

¹ Dale v. Wilson, 16 Minn. 525.

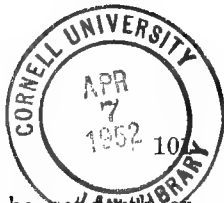
³ National German Amer. Bank v.

² Daggett v. Colgan, 92 Cal. 53; Lang, 2 N. D. 66.

United States v. Turner, 11 How.
(U. S.) 663.

⁴ Bollinger v. Gallagher, 144 Pa.
St. 205; Lynch v. People, 16 Mich.
472; McGlone v. Prosser, 21 Wis. 273.

JUDICIAL NOTICE.



status of the parties.¹ The statute need not be set forth or named in the pleadings, as the courts are bound to take judicial notice of the statute, and whether the facts set forth in the pleadings are sufficient to sustain an action or defense under it; it is the substance and not the form of the pleading that controls.² But in all actions brought upon a private statute the act must be recited and such facts stated as disclose a right of action under it, and no more of the act will be noticed by the court than is set forth in the declaration; and the same is equally true as to the pleadings where the statute is relied upon in defense to an action.³ Public acts need not be proved, as the court and jury are bound to know their provisions.

II. RAILROADS.

Courts are bound to take judicial notice of the general features of railroad business in respect to the separation of passenger and freight trains;⁴ that the earnings of a railroad are mainly derived from freight and passenger traffic, which neither begins nor ends with that particular road;⁵ that the demands and exigencies of commerce require the cars of one railroad company to be hauled over the road of another;⁶ that the speed of a railroad train can ordinarily be slackened sufficiently in a distance of two hundred yards to avoid running down a hack going at full speed on the track ahead of it;⁷ that brakemen feel impelled to obey the conductor's orders;⁸ that passengers on a sleeping-car receive a ticket at the ticket office and surrender it upon entering the car, and receive from the conductor of the car a berth check;⁹ that horses are liable to take fright at the escaping steam and noise caused by

¹ *Dapa v. Mays*, 1 Wm. Saund. 276, note 2; *Hastings v. Cunningham*, 39 Cal. 137; *Erlinger v. Bouceau*, 51 Ill. 94.

² *McHarry v. Eastman* (N. Y.), 7 Robt. 137; *State v. Dehlinger*, 46 Mo. 106.

³ *Hewett v. Harvey*, 46 Mo. 106.

⁴ *Atchison, T. & S. R. Co. v. Headland*, 20 L. R. A. 822.

⁵ *Hart v. Ogdensburg & L. C. R. Co.*, 52 N. Y. State Rep. 799; 67 Hun, 556.

⁶ *Louisville & N. R. Co. v. Boland*, 53 Am. & Eng. R. Cas. 169.

⁷ *Gulf, C. & S. F. R. Co. v. Ellis*, 54 Fed. Rep. 481.

⁸ *Mason v. Richmond & D. R. Co.*, 111 N. C. 482.

⁹ *Mann Boudoir Car Co. v. Dupre*, 54 Fed. Rep. 646; 47 Alb. L. J. 446.

the blowing of locomotive whistles in close proximity to them.¹

Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved and the apparent justice of the case. The rule that permits a court to do so is of practical value in the law of appeals where the evidence is clearly insufficient to support the judgment. In such case judicial notice may be taken of facts which are a part of the general knowledge of the country, and which are known and have been duly authenticated in repositories open to all, and especially so of facts of official, scientific or historical character. Thus, in *Hunter v. New York O. & W. R. Co.*² it was held that the court may take judicial notice of the size and height of the human body, and the fact that from the end of the spine to the top of the head an adult is less than thirty-six inches. No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence, but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for action in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference.³

¹ *Northern P. R. Co. v. Sullivan*, 53 Fed. Rep. 219.

² 27 N. Y. State Rep. 727; 116 N. Y. 616.

³ *Brown v. Piper*, 91 U. S. 37; *Romero v. United States*, 1 Wall. 721; *United States v. Teschmaker*, 22 How. (U. S.) 392.

CHAPTER VII.

ADMISSIONS AND CONFESSIONS.

ADMISSIONS.

- § 1. In general.
- 2. Illustrations.
- 3. Implied admissions.
- 4. Illustrations.
- 5. Agents.
- 6. Principal and surety.
- 7. Admission of former owner of chose in action.
- 8. Sheriff — Action for not executing process, etc.

- § 9. Attorney and counsel.
- 10. Person referred to by party.
- 11. Partners and joint contractors.
- 12. Administrators, executors, trustees, etc.— Admissions by.
- 13. Confessions.
- 14. Illustrations.
- 15. In one's own favor.
- 16. Whole admissions must be taken together.

ADMISSIONS.

§ 1. In general.— The term admissions is usually applied to civil transactions. The general rule is, that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence. An admission is a statement, oral or written, suggesting any inference as to any fact in issue, or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding. And the admission of a party, however made, may be given in evidence against him, but not in his favor, unless it is or is deemed to be competent for some other reason; and what a party says is evidence against himself, whether it relate to the contents of a written instrument, or to anything else. But as to the effect of the evidence it may be said that the oral admission of a party made *in pais* is competent evidence only of those facts which may lawfully be established by parol evidence.¹ Admissions may be made on behalf of the real party to any proceeding by any party to the proceeding;² or who has a substantial interest in the re-

¹Schwartz v. Hersker, 140 Pa. St. Rep. 225; Evans v. Montgomery, 95 Mich. 497.

550; Fisher v. Monroe, 51 N. Y. State Rep. 585; Soaps v. Eschberg, 42 Ill. App. 375; Harris v. McArthur, 90 Ga. 216; Dibble v. Dimick, 53 N. Y. State

²Smith v. Palmer, 6 Cush. 513; Turney v. Evans, 14 N. H. 343.

sult;¹ or who is privy in law, in blood or in estate to any party to the action.² And while where there is a privity of interest between parties the admissions of one are, in a proper case, evidence against the others, as in the case of lessors and lessees, donors and donees — in other words, where a person must recover through the title of another — he is bound by the declarations of the party through whom he claims. The indorser of a promissory note or bill of exchange does not claim by the title of the indorser, as he has a title of his own.³ A statement made by a person interested in a proceeding, or by a privy to any party thereto, is not an admission unless it is made during the continuance of the interest.⁴ It is a joint interest that renders the admission of one party admissible against another; thus, the admissions of one tenant in common are not competent against his co-tenant, though both are parties to the same side of a case.⁵ The same rule applies to executors and trustees, devisees and legatees.⁶ To make the admission of one party receivable against another, a foundation must first be laid by showing either that a partnership or a joint interest existed.⁷ But it is different where partners sue upon a promise to them as partners.⁸ The declarations or admissions of a person for whose benefit a policy of insurance is taken in another name are admissible because he is the real party in interest.

§ 2. Illustrations.—Admissions are only admissible when parol evidence is admissible to establish the fact.⁹ The declarations of a nominal plaintiff, in an action upon a note, made at any time before suit, are competent.¹⁰ Admissions of a holder of a note, before it was due and before indorsement, and which was negotiated before it was due, are not admissible against

¹ Bigelow v. Foss, 59 Me. 162; Pike v. Wiggins, 8 N. H. 356.

² Gratz v. Beates, 45 Pa. St. 495; Emerson v. Thompson, 16 Mass. 429; Tilton v. Emery, 17 N. H. 536; Daggett v. Shaw, 5 Metc. 223.

³ Cooper v. Wood, 1 Colo. App. 101; Re Williams' Will, 64 Hun, 163; 46 N. Y. State Rep. 791.

⁴ Mandeville v. Welch, 5 Wheat. 277.

⁵ Dan v. Brown, 4 Cow. 483.

⁶ Hamberger v. Root, 6 Watts & Serg. 431.

⁷ Rich v. Flanders, 39 N. H. 304; Grafton Bank v. Moore, 13 id. 99; Whitney v. Ferris, 10 Johns. 66; Buckman v. Barnum, 15 Conn. 68.

⁸ Lucas v. De La Cour, 1 M. & S. 249.

⁹ Brooks v. Ishell, 22 Ark. 488.

¹⁰ Clews v. Kehr, 90 N. Y. 633.

the indorsee.¹ But it is different when the note was overdue at the time of the transfer. While it is a general rule that admissions made by a person after he has parted with his interest in a chattel, chose in action, note or other security are inadmissible against the holder or assignee,² it is held that declarations of a former owner of a bill, transferred after dishonor, are competent to show that before such transfer the defendants were discharged from liability.³

§ 3. **Implied admissions.**—Admissions may be implied from conduct, language, silence, acquiescence, etc. The most unreliable of all evidence is that of the oral admissions of the party after the parties were in a state of controversy. The general rule is that declarations of one party made in the presence of the other, which naturally call for a reply, and which are not denied by the other, are admissible as evidence for the former.⁴ Thus, declarations relating to the subject-matter of a suit, made by a third person in the presence of a party to the suit, and to which each party had an opportunity to reply, but did not, are admissible in evidence against him. Silence and acquiescence is another dangerous kind of evidence. To affect a party with the statements of others on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence; it must plainly appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from his passiveness or silence. The rule is loosely applied that one's silence shall be construed as a virtual assent to all that is said in his presence, is susceptible of great abuse, and calls for a course of conduct which prudent and quiet men do not generally adopt. If that rule be sound to its full extent, it would be in the power of one party to ruin his adversary's case by drawing him into a compulsory altercation in the presence of chosen listeners, who would be sure to misrepresent what he said. The better rule seems to

¹ *Gjunston v. Griggs*, 5 Ga. 424.

² *Smith v. Shanck*, 18 Barb. 344.

³ *Hollister v. Rizner*, 9 Ohio. 1; *Rowe v. Jerome*, 18 Conn. 138; *Whit-
tier v. Vose*, 16 Me. 403.

⁴ *Black v. Hicks*, 27 Ga. 522; *Corser*

v. Paul, 41 N. H. 24; *Oliver v. Louis-
ville & N. R. Co.*, 43 La. Ann.
804; *Ball v. Independence*, 41 Mo.
App. 469; *Miller v. State*, 68 Miss.
221.

be that the mere silence of one, when facts are asserted in his presence, is no ground for presuming his acquiescence, unless the conversation were addressed to him, under such circumstances as to call for a reply. The person must be in a position to require the information, and he must ask it in good faith, and in a manner fairly entitling him to expect it, in order to justify any inference from the mere silence of the party addressed. Where a person is inquired of as to a matter which may affect his pecuniary interest, he has the right to know whether the party making the inquiry is entitled to make it as affecting any interest which he may represent, and for the protection of which he requires the information sought. And unless he is fairly informed upon these points he is not bound to give information. It is now a general rule that it must be shown that the other party heard the declarations, or was in a situation where he ought to have heard them;¹ and a conversation carried on in the presence and hearing of a party, to which he makes no reply, cannot be received in evidence against him, as an implied admission on his part of its truth, unless it was of such a character as would naturally call for a response for him, and he was in a situation in which he would have probably replied to it;² and a party is not called upon to dispute a declaration on every occasion on which it may be rehearsed to him.³ So statements made in the presence and hearing of a party, without contradiction by him, will not be construed as an admission by him of their truth, unless the truth of the statements must necessarily have been within his knowledge.⁴ Unsworn pleadings are never admitted as evidence against the pleader in another suit between him and other parties, as admissions or declarations of the facts contained in them.⁵ An admission contained in an undelivered instrument is not binding upon the party whose hand and seal are attached to it.⁶ And although it was held in *Kelley v. People*⁷ that the silence of a party under arrest,

¹ *Kirby v. State*, 89 Ala. 63; *Williams v. State* (Ark.), 16 S. W. Rep. 816.

³ *Gibney v. Marchay*, 34 N. Y. 301.

² *Hersey v. Burton*, 23 Vt. 685; *Lawson v. State*, 20 Ala. 65; *Spencer v. State*, id. 24; *Abercrombie v. Allen*, 29 id. 281; *Brainard v. Buck*, 25 Vt. 573.

⁴ *Edwards v. Williams*, 3 Miss. (2 How.) 846.

⁵ But see *Cook v. Barr*, 44 N. Y. 156.

⁶ *Robinson v. Cushman*, 2 Denio, 149.

⁷ 55 N. Y. 565.

when he hears statements tending to show his guilt, is evidence against him, the better rule seems to be that silence under such circumstances is not evidence from which any adverse inference can be drawn.¹ Nothing can be more dangerous than this kind of evidence, and it ought never to be received. Statements by officers and others in the presence of a party under arrest tending to show his guilt are generally impertinent, and best rebuked by silence. And in *The State v. Howard*², it was held that where a party is under arrest at the time a statement was made in his presence, his neglect to contradict it does not make it an implied admission. Where a person to whom an account is rendered or sent keeps the account for an unreasonable length of time without making any objection, it becomes a stated account. But parties are not bound at their peril to dispute an account as often as it is presented.³

§ 4. Illustrations.—An objection to one item of an account without saying anything about the other items may imply admission of the rest. In case of negotiable paper taken up even by a stranger, an assignment has been implied from the delivery to him of the note uncanceled.⁴ In proving corporate existence, evidence of the formal acceptance of the charter, and that the corporators have actually proceeded to exercise rights under the franchise, amount to an admission of its existence. And he who has received and enjoyed a consideration from the company cannot require further proof of its power to contract. One who has in any way dealt with the company as a corporation is taken to have admitted its existence.⁵ Having dealt with an officer as such is deemed an admission of his title.⁶ A return or indorsement made by an officer is, though not filed, competent against him as an admission. Until he has filed the return in the office where the law compels him to file it he may change the indorsement afterwards only by permission of the court.⁷ Liability of a defendant, as of a partner of a copartnership, is established by evidence that he

¹ *Bob v. State*, 32 Ala. 560; *Com. v. Walker*, 13 Allen, 570.

⁵ *Bangor, etc. R. Co. v. Smith*, 47 Me. 34.

² 102 Mo. 142.

⁶ 2 Whart. Ev., § 1153.

³ *Gibney v. Marchay*, 34 N. Y. 301.

⁷ *Nelson v. Cook*, 19 Ill. 440, 455;

⁴ *Champney v. Coope*, 32 N. Y. 543.

Barker v. Binninger, 14 N. Y. 270.

held himself out to the world as a partner.¹ Silence by defendant when he was told by plaintiff that he had sent a check is an admission. The commencement by a railroad company of condemnation proceedings to acquire title to easements is an admission of record that the occupant owns such easements.² An offer to sell property for a certain price is an admission of its value at or near the time of the offer.³ But it seems that evidence of the valuation which owners had placed upon their land for the purpose of taxation is not admissible upon the question of its value in condemnation proceedings.⁴ One by whose negligence a wagon belonging to another is broken, who requests the latter to have it repaired and promises to pay the cost, thereby admits his negligence.⁵ The statement of a wife in the presence of her husband and not denied by him is not competent evidence against him unless she would be competent as a witness in the premises.⁶ Evidence of the subsequent discharge of employees, or changes in appliances, or the addition of an entirely new apparatus, or subsequent changes and repairs by parties charged with negligence, is inadmissible as an implied admission of such negligence.⁷

The silence of one to whom a letter is written, when there is no duty to speak, does not operate as an admission of the matters to which the letter relates. In such cases the letter is incompetent as allowing a party to put in evidence his own declarations.⁸ So the possession of unanswered letters is not of itself evidence of acquiescence in their contents; but if they contain statements which the party receiving such letters would naturally deny if untrue, his omission to reply is evidence of their truth.⁹ So, omission of a party to reply to

¹ *Bennett v. Holmes*, 32 Ind. 108; *Co.*, 40 Fed. Rep. 649. But see *Kuntlin v. Goldsmith*, 40 Ga. 221; *ney v. Folkerts* (Mich.), 44 N. W. Rep. Penn. v. Kearney, 21 La. Ann. 21; 152; *Waldrof v. Greenwood L. & S. Crogan v. Carelton*, 21 Me. 493. R. Co., 28 S. C. 157.

² *Johnston v. Manhattan R. Co.*, 32 N. Y. State Rep. 685.

³ *Springer v. Chicago*, 135 Ill. 552.

⁴ *Railway v. Kell* (Tex. App.), 16 S. W. Rep. 936.

⁵ *Dunn v. O'Keefe*, 56 Hun, 648; 31 N. Y. State Rep. 311; *Moore v. Hill* (Vt.), 19 Atl. Rep. 99; *Gillingham v. Charleston Towboat & Tr.*

⁶ *St. Louis F. Nat. Bank v. Nichols*, 43 Mo. App. 385.

⁷ *Downey v. Sawyer*, 157 Mass. 418.

⁸ *Thomas v. Gage*, 57 N. Y. State Rep. 591; *Bank of British America v. Delafield*, 37 id. 864; 126 N. Y. 418; *Learned v. Tillotson*, 97 N. Y. 12.

⁹ *Fenno v. Weston*, 31 Vt. 345.

statements in a letter about which he has knowledge, when he replies to other parts of the letter, is evidence of the truth of the statements.¹

In criminal cases it may be shown as a presumption of guilt that the accused when charged with the crime denied the charge by asserting a falsehood,² or that he fled the state and lived under an assumed name, or tried to avoid arrest and trial.³ So, the breaking out of jail and escape of one indicted for crime, although it would not warrant a conviction, is evidence for the consideration of the jury.⁴

§ 5. *Agents.*—Admissions may be made by agents authorized to make them either expressly or by the conduct of their principals. But the admissions of an agent of a party cannot be given in evidence against his principal unless he is expressly authorized to make them, or when they are part of the *res gestæ*.⁵ To bind the principal it must be made in reference to the business in which the agent is at the time employed and within the scope of his authority.⁶ And the statement of an agent after the business of his agency has been closed is incompetent to bind his principal.⁷ The trustee of an express trust is bound by the admissions or declarations of the person whom he represents. But in some cases they are receivable only so far as his own interest is concerned. Thus, the declaration of an assignor for the benefit of creditors before the assignment is good to charge his estate with a debt, but if it is made after the assignment it is inadmissible for that purpose.⁸ The interpreter of a party acting for him at his request is the agent of the party, and the statements of such interpreter in a particular transaction in which he is so used are the statements of the party and may be proved the same as the statements of the party himself.⁹ But an interpreter in a court is not the agent of the witness, but a sworn officer of the court. An admission that a third party was au-

¹ Fenno v. Weston, 31 Vt. 353.

² State v. Bradley, 64 Vt. 466.

³ State v. Wilson, 111 N. C. 695;
State v. Potter, 108 Mo. 424.

⁴ Elmore v. State (Ala.), 13 S. Rep.
427.

⁵ Gurnsey v. Rhodes, 138 N. Y. 461;
53 N. Y. State Rep. 6.

⁶ Thomas v. Sternheimer, 29 Md.
268.

⁷ Budlong v. Van Nostrand, 24
Barb. 25.

⁸ Bateman v. Bailey, 5 T. R. 513.

⁹ Fabrigas v. Mostyn, 11 St. Tr. 171.

thorized to take any steps necessary to sell certain lands is not evidence that he was authorized to employ another to sell them, or to do anything except to sell it.¹

§ 6. **Principal and surety.**—A principal as such is not the agent of his surety for the purpose of making admissions as to the matters for which the surety gives security; but declarations or admissions of the principal, made during the transaction of the business for which the surety is bound, are in most cases competent as against the surety.² Thus, where A. guaranties the payment of goods sent by B. to C., the admissions of C. of the amount of goods received, etc., are competent against A. whenever made.³ So, where A. guaranties the performance of any contract which B. may make with C., the admissions and declarations of B. are competent against A. to prove the contract.⁴ But it is different as to the admissions of a principal on a bond for the faithful performance of a service, or to pay over moneys collected, etc. In such cases the admissions, declarations and confessions of the principal after the acts are incompetent as against the surety, except as to entries made in the course of his duty.⁵ Where a surety when sued for an act of his principal gives the principal notice of the suit and requests him to defend it, a judgment against the surety in such action will be conclusive evidence against the principal. So a judgment against the principal is evidence of that fact in an action against the surety.⁶ The general rule is that any act done by the principal during the transaction of the business for which the surety has agreed to be bound is part of the *res gestæ*. The surety is only liable for what the principal has actually done, not for what he says he has done. As a general rule a surety is not bound by the declarations of his principal, except when they are connected with the business in respect of

¹ Sandberg v. Palm (Minn.), 54 N. W. Rep. 1109; Carroll v. Tucker, 50 N. Y. State Rep. 611.

² Union Sav. Co. v. Edwards, 47 Mo. 445; Stovall v. Banks, 10 Wall. 583; Chelmsford Co. v. Demarest, 7 Gray, 1; Petch v. Lyon, 9 Q. B. 147; Krekstatt Brew. v. Furness Ry., L. R. 9 Q. B. 468.

³ Bacon v. Chesney, 1 Stark. 192.

⁴ Meade v. McDowell, 5 Binn. 195.

⁵ Whitmarsh v. George, 8 B. & C. 556; Hotchkiss v. Lyons, 2 Black, 222; Dawes v. Shedd, 15 Mass. 6; Fenner v. Lewis, 10 Johns. 38.

⁶ Drummond v. Prestman, 13 Wheat. 515.

which the surety becomes bound and are made by the principal at the time of transacting that business.¹ Entries made by a deceased person in the course of duty, or by which he had charged himself with the receipt of money, are evidence against a person who has become his surety that he would keep his accounts faithfully.² But the admissions of the principal as to his liability to a plaintiff, made after a breach of his contract, are not competent against his principal.

§ 7. **Admission of former owner of choses in action.**—The rule in regard to admitting the declarations of the owner of non-negotiable choses in action or notes overdue while holding the same, to the effect that the same had been paid or otherwise discharged, or are invalid as against a subsequent assignee; is different in different states. Such declarations are received in England, and in Vermont, Massachusetts, Maine, New Hampshire and Missouri.³ Thus, a declaration of a prior holder of a note, made while he held the note, after it was due, that it had been paid to him, or that the defendant had a good defense to it, is held to be competent. And although the same has been held to be the rule in New York, the contrary seems to be the consensus of opinion.⁴

§ 8. **Sheriff—Action for not executing process, etc.**—In actions against a sheriff, constable or marshal for not executing an execution or mandate for the collection of money, the statements of the debtor admitting his debt to be due to the execution creditor are competent as against them.⁵ The admissions of an under-sheriff are not admissible against the sheriff, unless they tend to charge him, he being the real party in the cause. The declarations of an under-sheriff are evidence and charge the sheriff only where his acts might be given in evidence to charge him; and then rather as acts than as declarations, the declarations being considered as part

¹ *Re Williams' Will*, 64 Hun. 163; *dle v. Criddle*, 21 Mo. 522; *Fisher v. 46 N. Y. State Rep.* 791; *Clark v. True*, 38 Me. 534; *Scammon v. Scammon*, 23 Barb. 464; *Douglass v. Howland*, 24 Wend. 35-58. *Scammon*, 33 N. H. 52; *Sylvester v. Crapo*, 15 Pick. 92.

² *Hinckley v. Davis*, 6 N. H. 210; *Mahaska v. Ingalls*, 16 Iowa, 81; *Amherst Bank v. Root*, 2 Metc. 522. ⁴ *Tousley v. Barry*, 16 N. Y. 497; *Booth v. Swezey*, 8 id. 276.

³ *Pocock v. Billings*, 2 Bing. 269; *Miller v. Bingham*, 29 Vt. 82; *Crid-* ⁵ *Hart v. Stevenson*, 25 Conn. 499; *506; Williams v. Bridges*, 2 Star. 42.

of the *res gestæ*.¹ But whenever a person is bound by the record, he is, for all purposes of evidence, the party in interest.

§ 9. **Attorney and counsel.**—An attorney of record is the agent of his client for the purpose of making admissions, whilst engaged in the actual management of the cause, either in court or out, as to the particular case in which he is so acting, so far as the conduct of the case is concerned. But statements made by such attorney out of court are not admissions merely because they would be admissions if made by the client himself.² Admissions of fact by an attorney in one action are not admissible in evidence against his client in another action.³ But as a general rule the admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause, and are conclusive if solemn admissions. Admissions, however, contained in the mere conversation of an attorney cannot be received against his client although they relate to the facts in controversy.

§ 10. **Person referred to by party.**—Where a party to any proceeding expressly refers to any other person for information in reference to a matter in dispute, the statements of that other person may be admissions as against the person who refers to him.⁴

§ 11. **Partners and joint contractors.**—Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts.⁵ But the liability of one person upon an alleged partnership contract cannot be proved by the admissions of the other alleged partner.⁶ Admissions made by a party, after the dissolution of a partnership, relating to facts done during its existence, are usually held to be inad-

¹ Wheeler v. Hambright, 9 Serg. & R. 396.

² Wilkins v. Stedger, 22 Cal. 231; McDermott v. Hoffman, 70 Pa. St. 32; Wilson v. Spring, 64 Ill. 18; Holderness v. Baker, 44 N. H. 414.

³ Nichols v. Jones, 32 Mo. App. 657.

⁴ Bidell v. Commercial Ins. Co., 3 Bosw. (N. Y.) 147; Turner v. Yates,

16 How. (U. S.) 14; Allen v. Killinger, 8 Wall. 480; Chapman v. Twitchell, 37 Me. 59.

⁵ Weed v. Kellogg, 6 McLean, 44; Munson v. Wickwire, 21 Conn. 513; 2 Smith's Lead. Cas. 387.

⁶ Bank of Osceola v. Outhwaite, 50 Mo. App. 124. But see Work v. McCoy (Iowa), 54 N. W. Rep. 140.

missible against the other partners.¹ Thus, in cases in which actions founded on contract have been barred by the statute of limitations, no joint contractor or his personal representative loses the benefit of such statute by reason only of any acknowledgment, or promise, or payment of any principal, interest or other money, by any other or others of them.² The fact that two persons have a common interest in the same subject-matter does not entitle them to make admissions respecting it as against each other;³ and where there are several parties on the same side of a case, the admissions of one are not competent to affect the others who may be joined with him unless there is some joint interest. If the parties have a joint interest in the matter in suit, they stand to each other in a relation similar to that of existing copartners.⁴ But in order to be admissible, admissions made by either to affect the other must be distinctly made by a party still liable upon the joint contract. Thus, the act of making a partial payment before the debt is barred by the statute of limitations, by one of several joint makers of a note, takes it out of the statute; but a payment appropriated, by the election of the creditor only, to the debt in question, is not a sufficient admission of that debt for that purpose.⁵ So an admission made by a joint contractor, after the death of his co-joint contractor, will not take the case out of the statute as against the latter.⁶

§ 12. Administrators, executors, trustees, etc.—Admissions by.—An admission of an administrator as to past transactions with his intestate, and not within his personal knowledge, is not admissible as part of the *res gestæ*;⁷ and no admission by an administrator, made before his appointment, is evidence against him after such appointment;⁸ and ordinarily an admission by one administrator is not binding upon his co-administrator as against the heirs or devisees of the deceased. An infant plaintiff in an action on a policy of in-

¹ Baker v. Stackpoole, 9 Cow. 420;

⁵ Holmes v. Green, 1 Stark. 488.

² Whart. Ev., § 1096. But see 1 Greenl. Ev., § 112.

⁶ Burleigh v. Stott, 8 B. & C. 36.

³ Elliot v. Nichols, 7 Gill, 85, 96.

⁷ Davis v. Gallagher, 124 N. Y. 487; 36 N. Y. State Rep. 461.

⁴ Dan v. Brown, 4 Cow. 483.

⁸ Prudential Ins. Co. v. Fredericks,

⁵ Johnson v. Beardslee, 15 Johns. 3. 41 Ill. App. 419.

surance is not bound by an admission made by his guardian in furnishing proof of loss under the policy, in regard to a matter not required by the contract to be stated.¹ Evidence of admissions of liability by an agent or attorney is inadmissible without proof that he had authority to bind his principal by such admissions.² Admissions made by a party while acting in her own right are inadmissible against her as administratrix.³

§ 13. **Confessions.**—A confession is an admission made at any time by a party charged with a crime, stating or suggesting the inference that he committed that crime. Confessions, if voluntary, are competent facts only as against the persons who make them. Confessions are divided into two classes, namely: judicial confessions, or those made before the magistrate, or in court; and extra-judicial confessions, or those made elsewhere than before a magistrate. These latter are not sufficient, standing alone, upon which to found conviction.⁴ As a general rule, a confession, to be admissible, must be affirmatively shown to have been free and voluntary and not preceded by any inducement to the prisoner to make a statement, held out by a person in authority, or not made until after such inducements, if given, had clearly been removed.⁵ But it seems that where there are no objections to proof of a confession, it may be shown whether voluntary or not.⁶ No confession is deemed to be voluntary if it appears to the court to have been caused by any inducement, threat or promise proceeding from a person in authority, and having reference to the charge against the person accused, whether addressed to him directly or brought to his knowledge indirectly.⁷ If an inducement, threat or promise gave the accused person

¹ Buffalo Loan, T. & S. D. Co. v. 26 Miss. 157; People v. Hennessey, Knights Templar & M. M. A. Ass'n, 15 Wend. 147.
38 N. Y. State Rep. 246; 126 N. Y. 450; 44 Alb. L. J. 47.

² Proctor v. Old Colony R. Co. 154 Mass. 251.

³ United States Life Ins. Co. v. Kielgast, 26 Ill. App. 567.

⁴ United States v. Douglass, 2 Blatchf. 207; Stringfellow v. State,

⁵ Reg. v. Thompson (1893), 2 Q. B. 12; Clayton v. State, 31 Tex. Cr. Rep. 489.

⁶ Smith v. State, 88 Ga. 627; State v. Moore (Mo.), 22 S. W. Rep. 1086.

⁷ People v. Ward, 15 Wend. 231; State v. Phelps, 11 Vt. 116; United States v. Cumphries, 1 Cranch C. C. 74.

reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceeding against him, such confession is incompetent and inadmissible.¹ But a confession is not involuntary merely because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person in authority.² The prosecutors, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions, are persons in authority. The master of the accused person is not as such a person in authority if the crime of which the person making the confession is accused was not committed against him.³ A confession is deemed to be voluntary if in the opinion of the court it is shown to have been made after the complete removal of the impression produced by any inducement, threat or promise which would otherwise render it involuntary.⁴ Facts discovered in consequence of confessions improperly obtained, and so much of such confessions as distinctly relate to such facts, may be proved.⁵ A confession is not incompetent because it was made under promise of secrecy;⁶ or in consequence of a deception practiced on the accused person for the purpose of obtaining it;⁷ or when he was drunk;⁸ or because it was made in answer to questions which he need not have answered, whatever may have been the form of these questions;⁹ or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.¹⁰

§ 14. **Illustrations.**—Although the general rule is that to render confessions of a party charged with a crime admissible

¹ *United States v. Knott*, 1 McLean, 499; *Com. v. Knapp*, 9 Pick. 496.

² *Aaron v. State*, 37 Ala. 106; *State v. Potter*, 18 Conn. 166; *Com. v. Drake*, 15 Mass. 161.

³ *Com. v. Howe*, 2 Allen, 153; *Shiffell's Case*, 14 Gratt. 652.

⁴ *State v. Carr*, 37 Vt. 191; *Fife v. Com.*, 29 Pa. St. 429; *Guild's Case*, 5 Halst. 163; *United States v. Kurtz*, 4 Cranch C. C. 166.

⁵ *Duffy v. People*, 26 N. Y. 588;

Com. v. Knapp, 9 Pick. 496; *Gates v. People*, 14 Ill. 433.

⁶ *State v. Mitchell*, 1 Phillips' (N. C.) L. 447.

⁷ *Price v. State*, 18 Ohio St. 418; *Com. v. Hanlon*, 3 Brewster, 461.

⁸ *Jefferds v. People*, 5 Park. Cr. Rep. 522; *Eskridge v. State*, 25 Ala. 30; *Com. v. Howe*, 9 Gray, 110.

⁹ *Com. v. Mosler*, 4 Pa. St. 264; *Carroll v. State*, 23 Ala. 28.

¹⁰ 1 Phillips' Ev. 420.

against him it must be clearly shown that they were free and voluntary,¹ the facts can be determined by their nature and the circumstances under which they were made.² They are admissible if no inducement was held out or threat made, or anything done to induce the accused to believe it would be better for him to confess, and worse if he did not;³ and a confession is presumed to be voluntary unless the contrary is shown, or something appears in the confession or its attendant circumstances to combat such presumption.⁴ For an officer to advise a prisoner that it would be better for him to confess does not render the confession by the prisoner inadmissible.⁵ The inducements to the making of a confession which should exclude proof thereof must come from one in authority, or be presented under circumstances likely to lead the defendant to suppose that they were sanctioned by one in authority.⁶ A private detective is not a person in authority whose promises or threats will make a confession inadmissible.⁷ If confessions are shown to have been voluntary and free from influence of promises or threats, the fact that the party was under arrest at the time will not make them inadmissible.⁸ An accused who objects to a written confession of guilt offered in evidence against him, and offers to prove that it was procured by threats or promises, or under such circumstances as would render it incompetent as evidence, is entitled to have it rejected unless the proof offered has been first heard.⁹ Where information derived from a confession leads to a discovery of material facts which go to prove the commission of the crime alleged, so much of the confession as strictly relates to the facts discovered, and the facts themselves, are admissible in evidence, although the confession was not voluntary.¹⁰

¹ *Coffee v. State*, 25 Fla. 501; *Murray v. State*, id. 528.

² *People v. Chapleau*, 121 N. Y. 266; 30 N. Y. State Rep. 989.

³ *State v. Moorman*, 27 S. C. 22; *People v. Cassaday*, 133 N. Y. 112; 44 N. Y. State Rep. 869.

⁴ *State v. Meyers*, 99 Mo. 107; *People v. Barker*, 60 Mich. 277; 1 Am. State Rep. 501; *People v. Fanning*, 131 N. Y. 659; 43 N. Y. State Rep. 771.

⁵ *State v. Meekins*, 41 La. Ann. 543.

⁶ *State v. Holden*, 42 Minn. 350.

⁷ *Early v. Com. (Va.)*, 11 S. E. Rep. 795.

⁸ *State v. Whitfield*, 109 U. S. 876; *People v. Chapleau*, 121 N. Y. 266.

⁹ *People v. Fox*, 121 N. Y. 449; 31 N. Y. State Rep. 570; *Bubster v. State*, 33 Neb. 663.

¹⁰ *Lowe v. State*, 88 Ala. 8.

§ 15. **In one's own favor.**—An indorsement on the instrument sued on, acknowledging a part payment and dated, is competent and sufficient to go to the jury, if in the handwriting of the creditor who is shown to have since deceased, if there is extrinsic evidence of the date, and the date shows that it was made at a time when its operation would be against the interest of the person making it.¹ But an entry in a party's books, though at the time against him, is not afterwards evidence for him.² Gestures are treated as acted language, and are no more admissible than declarations in favor of the party making them.³ A survey, though ancient, made by direction of the owner of the land for his own convenience, is not admissible evidence for him or those claiming under him, for a man cannot create evidence for himself.⁴ Thus, an officer's return upon a process is not admissible in his favor to prove any fact stated therein except such as are required to be stated.⁵ The declarations of an alleged donor are incompetent to impeach a gift.⁶ So the books of account of bank dealings are inadmissible in a suit between a bank and a third person to show such dealings in the bank's favor.⁷

There are some exceptions to the rule that a party's declarations or admissions shall not be received as evidence for him. Thus, a constable's return is evidence for him in action for taking the goods away under a pretense of a previous levy.⁸ It is the *res gestæ* if made strictly within his duty. A certificate or transcript of a judgment, and an execution or other proceeding in a case before him, is evidence for himself by a judge or a justice.⁹ The rule that an indorsement of part payment upon a note, where it is proved that the indorsement was in truth made when it was against the interest of the party who made it, is admissible evidence to take a case out of the statute of limitations, does not prevail where the

¹ Roseboom v. Billington, 17 Johns. 182.

⁵ Bruce v. Dyal (Ky.), 5 Mon. 125.

⁶ Romig v. Romig (Pa.), 2 Rawle,

² Schermerhorn v. Schermerhorn, 241.

1 Wend. 119.

⁷ State Bank v. McNiel (N. C.), 1 Hawks, 36.

³ Bowie v. Maddox, 29 Ga. 285.

⁸ Cornell v. Cook, 7 Cow. 310-313.

⁴ Anthoine v. Coit (N. Y.), 2 Hall, 40; Lazoin v. Orleans Nav. Co., 7 La. Ann. 682; Watson v. Osborn, 8 Conn. 363.

⁹ Maynard v. Thompson, 8 Wend. 393.

statute requires the promise to be in writing in order to remove the statute bar, or requires the evidence of payment to be in writing.

§ 16. Whole admissions must be taken together.— Where a party's oral admissions are adduced in evidence he is entitled to have the whole statement taken together, to the extent of all that was said by the same person in the same conversation that would in any way qualify or explain the part adduced against him, or tend to destroy or modify the use which the adversary might otherwise make of it, but no further.¹ It should be stated that this rule applies equally to written and verbal admissions. The whole of a confession must be received in evidence to render any part of it admissible, and it must be proved as it was made.²

¹Rouse v. Whited, 25 N. Y. 170; ²State v. Donelon, 45 La. Ann. Insurance Co. v. Newton, 22 Wall. 612.
32; Sullivan v. McMillan, 26 Fla. 443.

CHAPTER VIII.

BEST AND SECONDARY EVIDENCE.

I. OF BEST AND SECONDARY EVIDENCE.

§ 1. In general.

2. Primary evidence and rules for proving.
3. What instruments must be produced.
4. Admissions of party in place of writing.

II. PUBLIC DOCUMENTS.

5. In general.
6. Examined copies.
7. General records of the nation.
8. Exemplifications.
9. Copies equivalent to exemplifications.
10. Certified copies.
11. Legislative acts of states and territories.
12. Records and judicial proceedings of state courts, etc.

§ 13. Public records of state, etc., not judicial.

14. Foreign acts of state, judgments, etc.
15. Secondary evidence — What is.
16. Secondary evidence admissible when.
17. When writing need not be produced or accounted for.
18. Sufficiency of search, etc.
19. Notice to produce — Document, necessary when.
20. Notice to produce — Sufficiency of.
21. Effect of notice.
22. Secondary evidence — How proved.
23. Sufficiency of secondary evidence.
24. Memoranda.
25. Oral proof of contents of a deposition.
26. Demonstrative evidence.
27. Physical examination.
28. Photographs, etc.

I. OF BEST AND SECONDARY EVIDENCE.

§ 1. In general.— It is a general rule, universal in its application, that the best or highest kind of evidence which the nature of the case admits of must be given, and evidence which presupposes better evidence behind, in the party's possession or power, is secondary evidence.¹ But the rule requiring the production of the best evidence excludes only evidence which itself indicates the existence of more original sources of infor-

¹ Paige v. New York, 58 Hun, 603; Pendergast, 138 Pa. St. 633; McDuff
83 N. Y. State Rep. 844; Com. v. v. Detroit Eve. Jour. Co., 84 Mich. 1.

mation.¹ Thus, where a contract has been reduced to writing, the writing is the best evidence of its contents, and must be produced unless the party satisfies the court that it has been lost or destroyed, or, without fault on his part, he is unable to produce it.² There are three classes of cases where the contents of a written instrument which is capable of being produced must be proved by the instrument itself, and not by parol evidence. First, those instruments which the law requires to be in writing;³ second, those contracts which parties have reduced to writing; and third, all other writings the existence or contents of which are disputed, and which are material either to the issue or to the credit of a witness.⁴ Where a writing does not fall under either of these heads there is no ground for its excluding oral evidence; as, if a written communication is accompanied by a verbal one to the same effect, the verbal communication may be received as independent evidence, but not to prove the contents of the writing or as a substitute for it.⁵ Thus, secondary evidence may be sufficient if it is admitted without objection;⁶ and the rule which requires the production of a written instrument in evidence does not apply when the instrument is merely collateral to the issue, and where the fact to be proved relates to a subject distinct from the writings.⁷

§ 2. Primary evidence and rules for proving.—Sir J. Stephen, in his Digest of the Law of Evidence,⁸ states that “primary evidence means the document itself produced for the inspection of the court.”⁹ “Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the

¹ Taylor on Ev. 281; Phillips' Ev. 418.

² Taylor on Ev. 281; Meyers v. Bealer, 30 Neb. 280; Wiseman v. Northern P. R. Co., 20 Oreg. 425; 23 Am. St. Rep. 135; Watson v. Roode (Neb.), 46 N. W. Rep. 491; McAfee v. State, 85 Ga. 438.

³ Cox v. Ward, 107 N. C. 507; Fitzgerald v. Adams, 9 Ga. 471.

⁴ State, Thayer v. Boyd, 31 Neb. 382;

Belcher v. Farren, 89 Cal. 73; Harney v. Farren, id. 76.

⁵ Jacob v. Lindsay, 1 East, 460.

⁶ Wright v. Roseberry, 81 Cal. 87.

⁷ Hewitt v. State, 121 Ind. 245.

⁸ Arts. 64, 65, 67.

⁹ 2 Whart. Ev. 1091, 1092; Taylor v. Peck, 21 Gratt. 11, 20; Loomis v. Wadhams, 8 Gray, 557, 562; Crichton v. Smith, 34 Md. 42, 47.

parties only, each counterpart is primary evidence as against the parties executing it.”¹ “Where a number of documents are all made by printing, lithography or photography, or any other process of such a nature as in itself to secure uniformity in the copies, each is primary evidence of the contents of the rest;”² “but where they are all copies of a common original, no one of them is primary evidence of the contents of the original.”³ “Under the rules of the common law, if a document is attested it may not be used as evidence if there be an attesting witness alive, sane, and subject to the process of the court, until one attesting witness at least has been called for the purpose of proving its execution. If it is shown that no such attesting witness is alive or can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”⁴ The rule extends to cases in which the document has been burnt,⁵ or canceled; where the subscribing witness is blind;⁶ where the person by whom the document was executed is prepared to testify to his own execution of it;⁷ and where the person seeking to prove the document is prepared to prove an admission of its execution by the person who executed it, even if he is a party to the cause.⁸

There are several classes of cases in which a person seeking to prove the execution of an attested document is not bound to call for that purpose either the party who executed the deed or any attesting witness, or to prove the handwriting of any such party, viz.:

(1) Where his opponent produces it when called upon and claims an interest under it in reference to the subject-matter of the suit.⁹

¹ *West v. Davis*, 7 East, 363; *Carroll v. Peake*, 1 Pet. 18, 22.

² *Rex v. Watson*, 2 Stark. 129.

³ *Noden v. Murry*, 3 Camp. 224; 1 Whart. Ev., § 92.

⁴ *Heckhart v. Haine*, 6 Bin. 16; 1 Whart. Ev., § 723.

⁵ *Gillies v. Smither*, 2 Stark. 528.

⁶ *Cronk v. Frith*, 9 C. & P. 197.

⁷ *Story v. Lovett*, 1 E. D. Smith, 153.

⁸ *Call v. Dunning*, 4 East, 53; *Fox v. Reil*, 3 Johns. 477; *Turner v. Green*, 2 Cranch C. C. 202.

⁹ *Pearce v. Hooper*, 3 Taunt. 60; *Jackson v. Kingsley*, 17 Johns. 158; *Rearden v. Minter*, 5 M. & G. 204; *Jackson v. Halstead*, 5 Cow. 216, 218; *Collins v. Boynton*, 1 Q. B. 118; *McGregor v. Wait*, 10 Gray, 72.

(2) When the person against whom the document is sought to be proved is a public officer bound by the law to procure its due execution, and who has dealt with it as a document duly executed.¹

(3) When it is a document required by law to be registered, and a certified copy would be admissible in evidence.²

(4) When the instrument is not directly in issue, but comes incidentally in question in the course of the trial.³

(5) If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.⁴

Whenever a statute authorizes the acknowledgment of an instrument, providing at the same time that such instrument shall be admissible in evidence on proof of its acknowledgment, then, if the conditions required by the statute as prerequisites of the acknowledging appear from the record to have been observed, it is not necessary to call the attesting witnesses, but each instrument may be put in evidence after the acknowledgment required by the statutes, either by force of the statutes or at common law, by proving the execution.⁵

§ 3. What instruments must be produced.—It has been held that secondary evidence is not admissible to take the place of warrants,⁶ executions,⁷ returns on executions,⁸ bills of sale,⁹ maps,¹⁰ letters,¹¹ an order of court,¹² the filing of an intention to become a citizen,¹³ the proceedings of the legislature, and the contents of a bill introduced therein,¹⁴ the action

¹ *Plumer v. Brisco*, 11 Q. B. 46; *Bailey v. Bidwell*, 13 M. & W. 73.

² 1 *Greenl. Ev.*, § 571; *Knox v. Siloway*, 1 *Fairf. (Me.)* 201, 216; *Scanlan v. Wright*, 13 *Pick.* 523; *Burghart v. Turner*, 12 *id.* 534; *Kelsey v. Hanmer*, 18 *Conn.* 311.

³ 1 *Greenl. Ev.*, § 573; *Curtiss v. Belknap*, 21 *Vt.* 433; *Ayers v. Hewitt*, 19 *Me.* 281; *Fairfax v. Fairfax*, 2 *Cranch C. C.* 25.

⁴ *Talbot v. Hodson*, 7 *Tenn.* 251; *Hooker v. Bowles*, 2 *Blackf.* 90; *Hall v. Phelps*, 2 *Johns.* 451; *Whitaker v. Sailsbury*, 15 *Pick.* 534.

⁵ *Houghton v. Jones*, 1 *Wall.* 702, 706; also, 1 *Whart. Ev.*, § 740.

⁶ *State v. Atherton*, 16 *N. H.* 203.

⁷ *Sweetser v. Drove*, 19 *Ala.* 255.

⁸ *McDade v. Mead*, 18 *Ala.* 214.

⁹ *Yarborough v. Hudson*, 19 *Ala.* 653.

¹⁰ *Pool v. Myers*, 21 *Miss.* 466.

¹¹ *Halcombe v. State*, 28 *Ga.* 66.

¹² *Stillman v. Palis*, 23 *Ill. App.* 408; *Bobb v. Letscher*, 30 *Mo. App.* 43.

¹³ *Bode v. Trimmer*, 82 *Cal.* 513.

¹⁴ *Sackrider v. Saginaw County Supervisors*, 79 *Mich.* 59.

of a highway commissioner in reference to building a bridge,¹ and any and all writings the contents of which are material to the issue.² Certified copies of maps from a public office are not admissible in evidence to locate a disputed boundary, in the absence of any evidence rendering the original admissible or of any statute requiring such maps to be filed in such office.³

§ 4. **Admissions of party in place of writing.**— While in New York it has been held that the admissions of a party to the record can only be resorted to as evidence where direct parol testimony of the facts thus sought to be proved would be admissible, and consequently that they cannot be received for the purpose of proving matters of record, nor the contents of a written instrument, except in those cases where ground has been laid for the reception of secondary evidence,⁴ the general rule seems to be that parol admissions of a party to the record, and his acts amounting to admissions, are received as primary evidence, although they relate to the contents of a deed or other instrument which are directly in issue;⁵ and no foundation need be laid for proof of the admissions of a party against his own interest.⁶

II. PUBLIC DOCUMENTS.

§ 5. **In general.**— Sir J. Stephen, in his Digest of the Law of Evidence,⁷ states the rule to be, that “when a statement made in any public document, register or record, judicial or otherwise, or in any pleading or deposition kept therewith, is in issue, or is relevant to the issue in any proceeding, the fact that that statement is contained in that document may be proved. The contents of any public document may be proved by producing the document itself for inspection from

¹ State ex rel. Greenwood v. Board of Supervisors, 125 Ill. 334.

² Beaudreau v. Cape Girardeau, 71 Mo. 392; Thayer v. Boyd, 31 Neb. 682; Belcher v. Farren, 89 Cal. 73; Bowick v. Miller, 21 Oreg. 25; Cox v. Ward, 107 N. C. 507.

³ Donohue v. Whitney, 133 N. Y. 178; 44 N. Y. State Rep. 508.

⁴ Man v. Show, 56 Hun, 647; 32 N. Y. State Rep. 356.

⁵ Loomis v. Woodham, 8 Gray (Mass.), 557.

⁶ Hunter v. Gibbs, 79 Wis. 70; Bartlett v. Cheesebrough, 32 Neb. 339; Morey v. Hoyt, 62 Conn. 542; 47 Alb. L. J. 310.

⁷ Arts. 74, 75, etc.

proper custody, and identifying it as being what it professes to be.”¹

§ 6. Examined copies.—The contents of any public document whatever may in all cases be proved by an examined copy. An examined copy is a copy proved by oral evidence to have been examined with the original and to correspond therewith. The examination may be made either by one person reading both original and the copy, or by two persons, one reading the original and the other the copy, and it is not necessary that each should alternately read both.²

§ 7. General records of the nation.—Copies of any books, records, papers or documents in any of the executive departments or public offices of the federal government, authenticated under the seals of such departments or officers respectively, and certified by the officer at the head of such office for the time being, shall be admitted in evidence equally with the original thereof.³

§ 8. Exemplifications.—An exemplification is a copy of a record set out either under the great seal or under the seal of a court. A copy made by an officer of the court bound by law to make it is equivalent, in courts of the same state, to an exemplification, though it is sometimes called an office copy. An exemplification is equivalent to the original document exemplified.⁴

§ 9. Copies equivalent to exemplifications.—A copy made by an officer of the court who is authorized to make it by a rule of the court, but not required by law to make it, is regarded as equivalent to an exemplification in the same cause and court, but in other causes or courts it is not admissible unless it can be proved as an examined copy.⁵

§ 10. Certified copies.—It is provided by many statutes in the different states that various certificates, official and public documents, documents and proceedings of corporations,

¹ Stephen's Dig. of Law of Ev., art. 74.

³ R. S. U. S., §§ 882-898.

² 2 Ph. Ev. 200, 231; T. E., §§ 1379, 1389; R. N. P. 113; Whitehouse v. Beckford, 9 Fost. 471, 480; 1 Greenl. Ev., §§ 91, 508; 1 Whart. Ev., § 94; Dig. Law Ev., art. 75.

⁴ 1 Whart. Ev., §§ 107, 104; Dig. Law Ev., art. 77.

⁵ 1 Whart. Ev., § 104; Dig. Law Ev., art. 78.

and of joint-stock and other companies, and certified copies of documents, by-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they are respectively authenticated in the manner prescribed by such statutes. Whenever, by virtue of any such provision, any such certificate or certified copy as aforesaid is receivable in proof of any particular in any court of justice, it is admissible as evidence if it purports to be authenticated in the manner prescribed by law, without proof of any stamp, seal or signature required for its authentication or of the official character of the person who appears to have signed it.¹ The edition of the laws and treaties of the United States published by Little & Brown are competent evidence of the several public and private acts of congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States and of the several states, without any further proof or authentication thereof.²

§ 11. Legislative acts of states and territories.—The Revised Statutes of the United States provide that the acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory or country affixed thereto; but this provision does not exclude any other method of proof allowed by the state law, or admitted by the court where the same may be offered in evidence.³

§ 12. Records and judicial proceedings of state courts, etc.—The Revised Statutes of the United States provide that the records and judicial proceedings of the courts of any state or territory, or of any country subject to the jurisdiction of the United States, shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice or presiding magistrate that the said attestation is in due form. And the

¹ 2 Whart. Ev., §§ 1313, 1314; 1 Greenl. Ev., § 200; Bullen v. Arnold, 31 Me. 583; Ross v. Read, 1 Wheat. 482; Dig. Law Ev., art. 78.

² R. S. U. S., § 908.

³ R. S. U. S., § 905.

said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken; but this provision does not exclude any other method of proof allowed by the state law, or admitted by the court where the same may be offered in evidence.¹

§ 13. **Public records of state, etc., not judicial.**— The Revised Statutes of the United States provide that all records and exemplifications of books which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by the attestation of the keeper of said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish or district in which such office may be kept, or of the governor or secretary of state, the chancellor or keeper of the great seal of the state or territory or country, that the said attestation is in due form and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified, or, if given by such governor, secretary of state, chancellor or keeper of the great seal, it shall be under the great seal of the state or territory or country aforesaid in which it is made. And the said records and exemplifications so authenticated shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts and offices of the state, territory or country as aforesaid from which they are taken; but this provision does not exclude any other method of proof allowed by the state law, or admitted by the court where the same may be offered in evidence.²

§ 14. **Foreign acts of state, judgments, etc.**— Foreign laws, acts of a state and judgments may be authenticated by

¹ R. S. U. S., § 905; *Turnbull v. Payne*, 95 U. S. 418, 422. ² R. S. U. S., § 906.

an exemplification of a copy under the great seal of the state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer properly authorized by law to give the copy, which certificate must itself also be authenticated.¹

§ 15. **Secondary evidence—What is.**—Secondary evidence consists of examined copies, certified copies, exemplifications, office copies, oral accounts of the contents of a document given by some person who has himself seen it, counterparts of documents as against the parties who did not execute them, and all copies made from the original and proved to be correct.²

§ 16. **Secondary evidence admissible when.**—Parol proof of the contents of written instruments may be given upon the proof of their loss from whatever cause, whether inevitable accident or mere carelessness, or the voluntary act of the party, provided proof is first made that diligent but unavailing search has been made for them in the places where they would be most likely to be found, and the evidence of loss and search is such as to make it apparent that parol evidence is the best evidence in the party's possession or in his power to produce.³ The contents of a paper voluntarily destroyed by a party may, after proof of its destruction, be shown by parol,⁴ but he must repel every inference of a fraudulent design in its destruction.⁵ There are many cases in which the contents of paper writings may be shown by secondary evidence, among which are the following:

First. Where the question arises on the examination of a witness on the *voir dire*.⁶

¹ Ennis v. Smith, 14 How. (U. S.) 400, 426; Church v. Hubbard, 2 Cranch, 187, 237; United States v. Wiggins, 14 Pet. 334, 346; United States v. Rodman, 15 id. 130, 137; Stein v. Bowman, 13 id. 209, 218; Watson v. Walker, 23 N. H. 471, 496; Buttrick v. Allen, 8 Mass. 273; Spaulding v. Vincent, 24 Vt. 501, 504; Delafield v. Hand, 3 Johns. 310, 313; Packard v. Hill, 7 Cowen, 434, 443.

² Stephen's Dig. of Law of Ev., art. 70; 1 Whart. Ev., § 740.

³ Wolf v. Mathews, 39 Mo. App. 376; Ebersole v. Rankin, 102 Mo. 488; Bounds v. Little, 79 Tex. 128; Connell v. Wildes (Mass.), 26 N. E. Rep. 1114; Gillis v. Wilmington, O. & E. C. R. Co., 108 N. C. 441.

⁴ Adams v. Guice, 30 Miss. 397.

⁵ Blake v. Fash, 44 Ill. 302.

⁶ Rex v. Gesburn, 5 East, 57.

Second. Where the papers are voluminous, and it is only necessary to prove their general results.¹

Third. Where there is a strong presumption of law in favor of the existence of the fact which the writing could be used to sustain, as the appointment of public officers.²

Fourth. Where it is in the hands of the opposite party, who, upon proper notice, refuses or neglects to produce it.³

Fifth. Where the original writing is beyond the jurisdiction of the court, or is lost or destroyed.⁴

Sixth. Where its production is physically impossible or highly inconvenient.

If a stranger is served with a *subpœna duces tecum* to produce a paper in his possession and does not produce the document, and has no lawful excuse or justification for refusing or omitting to do so, his omission does not entitle the party to give secondary evidence of the contents of the document.⁵

Sir J. Stephen, in his Digest of the Law of Evidence,⁶ lays down the following rules for the admission of secondary evidence, viz.: "Secondary evidence may be given of the contents of a document in the following cases: When the original is shown or appears to be in the possession or power of the adverse party, and when, after notice, he does not produce it;⁷ when the original is shown or appears to be in the possession or power of a stranger not legally bound to produce it, and who refuses to produce it after being served with a *subpœna duces tecum*, or after having been sworn as a witness and asked for the document and having admitted that it is in court;⁸ when the original has been destroyed or lost, and proper search has been made for it,⁹ the loss may be proved by an admission of the party or his attorney;¹⁰ when

¹ Meyer v. Lefton, 2 Stark. 274.

² Berryman v. Wise, 4 T. R. 366.

³ Portier v. Barclay, 15 Ala. 439; Weeks v. Lyon, 18 Barb. 530; Dean v. Berder, 15 Tex. 298.

⁴ Pendeny v. Crescent Life Ins. Co., 21 La. Ann. 410.

⁵ Bull v. Loveland, 10 Pick. 9; Rex v. Llanfaethly, 2 E. & B. 940.

⁶ Art. 71.

⁷ Rex v. Watson, 2 T. R. 201; Tur-

ner v. Yates, 16 How. (U. S.) 14, 26; Hanson v. Eustace's Lessee, 2 How. (U. S.) 653, 708; Riggs v. Taylor, 9 Wheat. 483, 486.

⁸ Miles v. Eddy, 6 C. & P. 732; Marston v. Downes, 1 A. & E. 31; Brandt v. Klein, 17 Johns. 335; Rush v. Sowerwine, 3 H. & J. 97.

⁹ 1 Ph. Ev., § 452; 2 Ph. Ev., § 281; T. E. (from Greenl.), § 299.

¹⁰ R. v. Haworth, 4 C. & P. 254;

the original is of such a nature as not to be easily movable,¹ or is in the possession of a person living beyond the jurisdiction of the court;² when the document is required or authorized by law to be registered, and a certified copy from the registry is made evidence by statute;³ when the original is a document for the proof of which special provision is made by statute or any law in force for the time being;⁴ when the originals consist of numerous documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection, provided that that result is capable of being ascertained by calculation."⁵ Any secondary evidence of a document is admissible if it is the best evidence obtainable.⁶ In some cases proof must be made by copies duly authenticated as prescribed by statute. In other cases, evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents. Questions as to the existence of facts rendering secondary evidence of the contents of documents admissible are to be decided by the judge;⁷ unless, in deciding such a question, the judge would, in effect, decide the matter in issue.

§ 17. When writing need not be produced or accounted for.—Oral evidence of the contents of a writing, if collateral to the issue involved, is competent without reference to the existence of the instrument itself;⁸ and where the writing is

Taylor v. Riggs, 1 Pet. 591, 596; *Patterson v. Winn*, 5 id. 233, 240, 242; *Riggs v. Taylor*, 9 Wheat. 581, 596.

¹ *Mortimer v. McCallan*, 6 M. & W. 67, 68; *Bruce v. Nicolopulo*, 11 Ex. 133; *N. Brookfield v. Warren*, 16 Gray, 171, 174.

² *Alivon v. Furnival*, 1 C., M. & R. 277, 291-92; *Burton v. Driggs*, 20 Wall. 125, 134; *Sheppard v. Giddings*, 22 Conn. 282; *Bowman v. Sanborn*, 5 Fost. 87, 112.

³ *Patterson v. Winn*, 5 Pet. 233, 241; *Smith v. United States*, id. 292, 299.

⁴ *Barney v. Schneider*, 9 Wall. 248; *Raymond v. Longworth*, 4 McLean, 481, 483.

⁵ *Roberts v. Doxen, Peake*, 116; *Meyer v. Sefton*, 2 Stark. 276; *Boston & W. R. R. Corp. v. Dana*, 1 Gray, 83, 104; *Burton v. Driggs*, 20 Wall. 125, 136.

⁶ *Munn v. Godbold*, 3 Bing. 297; *R. v. Castleton*, 7 T. R. 236; *Butler v. Maples*, 9 Wall. 766, 778; *Page v. Page*, 16 Pick. 368; 1 Whart. Ev., § 141. But see *Cornett v. Williams*, 20 Wall. 226, 246.

⁷ *Stowe v. Querner*, L. R. 5 Exch. 155; *Taylor v. Riggs*, 1 Pet. 591, 597; *Minor v. Tillotson*, 7 id. 99.

⁸ *Rogers v. Crook (Ala.)*, 12 S. Rep. 108.

collateral to the question in issue it need not be produced. Thus, where the action is to recover the amount of a deposit in a bank, a party can testify as to the amount of a draft deposited without producing the draft or laying a foundation for parol evidence.¹ The same rule prevails when the action is not directly upon the agreement, for non-performance of it; or where the action is for the plaintiff's share of money had and received by the defendant under a written security for a debt due to them both. So where a written instrument has accomplished its purpose, and has been given up to the maker, the presumption is that it has been destroyed, as there was no longer any necessity or reason for preserving it. In such cases, the law permits secondary evidence of the contents of written instruments.² So parol evidence of the posting of notices of sale is admissible. The rule requiring the production of the writing itself as the best evidence does not extend to mere notices or to matters collateral.³ Plaintiff may testify to his ownership of real estate,⁴ or stock.⁵ No notice to produce an instrument is necessary when, from the nature of the action, the party must know that he will be charged with the possession of it.⁶ Thus, in an action for trover for the conversion of a note or other writing,⁷ or in a prosecution for stealing a document, and in an action for not delivering a telegram or written instrument, no notice to produce is necessary.⁸ A notice need not be given to the opposite party to produce a paper of which he has fraudulently or forcibly obtained possession; nor where the party or his attorney has admitted the loss of the paper.⁹

§ 18. Sufficiency of search, etc.—The burden of showing the loss of a written instrument is upon the party seeking to introduce secondary evidence. He must establish its loss by proof that he has made diligent but unavailing search for the

¹ *Bowen v. Nat. Bank of Newport*, 11 Hun, 226.

² *Chrysler v. Renois*, 43 N. Y. 212.

³ *McMillan v. Baxley*, 112 N. C. 578; *Lavretta v. Halcombe* (Ala.), 12 S. Rep. 789.

⁴ *Chicago, St. P., M. & O. R. Co. v. Gilbert*, 52 Fed. Rep. 711.

⁵ *Wolfe v. Underwood* (Ala.), 12 S. Rep. 234.

⁶ *Reliance Lumber Co. v. Western Union Tel. Co.*, 58 Tex. 394; 44 Am. Rep. 622; *Forward v. Harris*, 30 Barb. 338; *State v. Mayberry*, 48 Me. 218.

⁷ *Hays v. Riddle*, 1 Sandf. 248.

⁸ *Dana v. Conant*, 30 Vt. 246.

⁹ *How v. Hall*, 14 East, 276.

paper in places where it would be most likely to be found, and the degree of diligence necessary to be shown must depend upon the value and importance of the lost document.¹ But it is sufficient if he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest.² If the instrument was executed in duplicate, due diligence must be shown to ascertain whether any counterpart exists, and if so, to obtain it to be used upon the trial.³ Where it may be in either of two or more places, all the places should be searched; and if it be in the custody of either of two or more persons, inquiry should be made of all of them.⁴ The search should have been made as recent as possible.⁵

§ 19. Notice to produce — Document, necessary when.— To render admissible secondary evidence of a writing which goes to make up direct proof of the issues, it must be shown that every legitimate effort to produce the original has been exhausted.⁶ The party offering it must show the loss or destruction of the original, and, if it appears to be in the hands of the adverse party, that he has given notice to produce the original.⁷ It is no ground for excluding a party's testimony as to the contents of a writing that it has been negligently destroyed by the party who offers its contents in evidence.⁸ The burden is upon the party seeking to make use of secondary evidence to establish either that the paper is beyond the jurisdiction of the court or that it is lost or destroyed,⁹ even though a copy is set out in the pleading.¹⁰ And as a general

¹ *Pierce v. Wallace*, 18 Cal. 165; 497; *Gonzalis v. State*, 31 Tex. Cr. *Prettyman v. Wallace*, 34 Ill. 175; Rep. 508.
² *Vorhees v. Dorn*, 51 Barb. 580; *Poe v. Darrah*, 20 Ala. 283; *Simpson v. Norton*, 45 Me. 281.

³ *Holbroke v. School Trustees*, 28 Ill. 187; *Sellers v. Carpenters*, 33 Me. 485; *Kidder v. Blaisdall*, 45 id. 461.

⁴ *Poignard v. Smith*, 8 Pick. 272.

⁵ *Taylor on Ev.* 307.

⁶ *Porter v. Wilson*, 13 Pa. St. 641.

⁷ *Brooks v. McMeekin*, 37 S. C. 285.

⁸ *Roberts v. Dixon*, 50 Kan. 436; *Scanlon v. Hodges*, 52 Fed. Rep. 354; *Kleiman v. Geiselmann*, 45 Mo. App.

⁹ *Rodgers v. Crook* (Ala.), 12 S. Rep. 108.

¹⁰ *Foster v. State*, 88 Ala. 182; *Sunday v. Thomas*, 26 Ga. 237; *Shorter v. Cunningham*, 87 Cal. 209; *Heller v. Peters*, 140 Pa. St. 648; *Rea v. Jaffray*, 82 Iowa, 231; *Martin v. Cooper*, 87 Cal. 97.

¹¹ *Coffing v. Carnahan*, 127 Ind. 427; *Kuhra v. Schwartz*, 33 Mo. App. 610; *Mugge v. Adams*, 76 Tex. 448; *State v. Thomson*, 79 Iowa, 703; *Canal & I. Co. v. Dunbar*, 80 Cal. 530.

rule, secondary evidence of the contents of a document may not be given, unless the party purposing to give such secondary evidence has, if the original is in the possession or under the control of the adverse party, given him such notice to produce it as the court regards as reasonably sufficient to enable it to be produced;¹ or has, if the original is in the possession of a stranger to the action, served him with a *subpœna duces tecum* requiring its production.² If a stranger so served does not produce the document, and has no lawful justification for refusing or omitting to do so, his omission does not entitle the party who served him with the subpoena to give secondary evidence of the contents of the document.³ Such notice is not required in order to render secondary evidence admissible in any of the following cases:

(1) When the document to be proved is itself a notice.⁴

(2) When the action is founded upon the assumption that the document is in the possession or power of the adverse party and requires its production.⁵

(3) When it appears or is proved that the adverse party has obtained possession of the original from a person subpoenaed to produce it.⁶

(4) When the adverse party or his agent has the original in court.⁷

Non-residence of person to whom a letter was addressed is insufficient to render parol evidence of its contents admissible in the absence of any effort to procure the letter.⁸ But a letter-press copy is admissible in evidence where the original letter is shown to be beyond the court's jurisdiction.⁹

¹ Com. v. Emery, 2 Gray, 80; Conant, 30 Vt. 246, 257; McLean v. Turner v. Yates, 16 How. (U. S.) 14; Hertzog, 6 S. & R. 154.

Dwyer v. Collins, 7 Ex. 648.

⁶ Leeds v. Cook, 4 Esp. 256.

² 1 Whart. Ev., § 150; Brandt v.

Clein, 17 Johns. 335; Newton v. Chaplin, 10 C. B. 56.

³ Bull v. Loveland, 10 Pick. 9, 14; R. v. Llanfaethly, 2 E. & B. 946.

⁴ Eagle Bank v. Chapin, 3 Pick. 180, 182; Marrow v. Commonwealth, 48 Pa. St. 305, 308.

⁵ How v. Hall, 14 East, 247; Hays v. Riddle, 1 Sandf. 248, 251; Dana v.

⁷ Dwyer v. Collins, 1 Ex. 639; McPherson v. Rathbone, 7 Wend. 216, 219; Rhoads v. Selin, 4 Wash. (D. C.)

715, 718.

⁸ Kischner v. Loughlin (N. M.), 28 Pac. Rep. 505.

⁹ Smith v. Traders' Nat. Bank, 82 Tex. 368; Magee v. Herman (Minn.), 52 N. W. Rep. 909; Sulphur Springs F. Nat. Bank v. Willis (Tex.), 18 S. W. Rep. 205.

§ 20. Notice to produce — Sufficiency of. — Where any paper is in the possession or under the control of the adverse party, a reasonable notice must be served upon him or his attorney to produce it, and secondary evidence of its contents cannot be given unless such party neglects or refuses to produce it after such notice.¹ The sufficiency of the notice both as to matter and time rests in the discretion of the court in view of all the circumstances. One notice given in the same case is enough although the action is tried several times.² The notice must specify the paper desired with certainty. But a notice to produce all letters written by defendant to plaintiff relating to the matters in dispute between certain dates is sufficient.³

§ 21. Effect of notice. — In order to render a notice operative to let in secondary evidence, it must be shown that the original instrument is in the hands of the opposite party. If the party refuses to produce the paper he cannot afterwards use the original either to contradict the secondary evidence,⁴ or to refresh the memory of witnesses, or, it seems, for any purpose, but is in effect bound by any legal and satisfactory evidence given on the other side relating thereto. But in all cases the party offering secondary evidence must prove the original in like manner as if he himself had produced it. If, however, the person producing it is a party to the instrument or claims a beneficial interest under it, it is *prima facie* to be taken to be duly executed, and may be read without proof of its execution.⁵ Notice to produce a document, and inspection thereof when produced by the other party, are not enough to make it evidence.⁶ It was formerly held to be the general rule in some states and in England that when a book or document is produced on notice, and the party giving the notice inspects it, it becomes evidence in the case and may be used as such if material.⁷ But whatever may have been the ancient

¹ Cooper v. Granberry, 33 Miss. 117; Bright v. Young, 15 Ala. 112.

⁴ Thompson v. Hodgdon, 12 Ad. & E. 135.

² Jackson v. Shearman, 6 Johns. 19; Cummings v. McKinney, 5 Ill. 57; Hope v. Beaden, 17 Q. B. 209.

⁵ Betts v. Badger, 12 Johns. 223; Jackson v. Kingsley, 17 id. 157.

⁶ Smith v. Rentz, 131 N. Y. 169.

³ Waldron v. Donison, 11 Wend. 65; Gardner v. Wright, 15 L. T. (N. S.) 325.

⁷ Long v. Drew, 114 Mass. 77; Blake v. Russ, 33 Me. 360; Calvert v. Flower, 7 C. & P. 386; Jordan v.

rule in England upon the subject, we do not understand the rule to be general at the present time. The courts of Massachusetts, Maine and Delaware seem to have followed the supposed English rule on the subject.¹ The party calling for books and papers would be subjected to great hazard if an inspection merely, without more, would make them evidence in the case. That rule tends rather to the suppression than to the ascertainment of truth, and the opposite rule is, as it seems to us, better calculated to promote the ends of justice. The production of books and papers on notice is the voluntary act of the party. If he refuses, it may authorize the other party to give secondary evidence of their contents, which the party having possession cannot then answer by producing them.² The effect of a refusal to produce papers is that parol evidence of their contents may be given; and if such secondary evidence is imperfect, vague and uncertain as to dates, sum, etc., every intendment and presumption shall be against the party who might remove all doubt by producing the highest evidence.³ When an objection is made to secondary evidence of the contents of a writing, the objector must not only prove the existence of better evidence but also that it was known to the other party in time to have produced it on the trial.⁴

§ 22. **Secondary evidence — How proved.**—As a general rule there are no degrees in secondary evidence.⁵ Satisfactory evidence of the contents of the writing must be produced. Where a copy is offered its accuracy must be shown; but a copy of a letter taken by a copying machine, although still only a copy, will be presumed to be correct.⁶ An office copy, *i. e.*, one made by the officer having the custody of the document, in the same court and in the like cause, is equivalent to the original document of which it is a copy. A written proposition accepted with parol modification is the best

Wilkins, 2 Wash. C. C. 482; Penaker & C. Con. v. Lamson, 4 Shep. 224.

¹ Clark v. Fletcher, 1 Allen, 53.

² Carradine v. Hotchkiss, 120 N. Y. 608; 31 N. Y. State Rep. 951; Smith v. Rentz, 131 N. Y. 169; 42 N. Y. State Rep. 879.

³ Jewell v. Center, 25 Ala. 498; Merwin v. Ward, 15 Conn. 377.

⁴ Minneapolis Times Co. v. Nimocks, 55 N. W. Rep. 456.

⁵ Carpenter v. Dame, 10 Ind. 125.

⁶ Hagedorn v. Reed, 3 Camp. 377

evidence of so much of the resulting contract as the writing contains.¹ A book purporting to contain all the ordinances of a city or town, and shown to be in the custody of the corporation, is evidence of itself.² Where permitting comparison of a disputed handwriting with any writing proved to the satisfaction of the court to be genuine is allowed, it is proper to admit for comparison signatures proved by persons who had on other occasions seen the writing of the person whose signature the one in controversy purported to be.³ A deed over thirty years old, coming from proper custody, under which title has been asserted, may be admitted in evidence without further proof;⁴ and this is the rule although it may not have been properly authenticated for record.⁵

§ 23. **Sufficiency of secondary evidence.**—Not only must the party offering secondary evidence of a paper prove that such paper once existed, and that its contents were such as to sustain the material allegations in support of which it is offered,⁶ but also its due execution,⁷ genuineness,⁸ and its loss or destruction without culpability on his part;⁹ and he must also repel every inference of fraudulent intent in its destruction.¹⁰ He must prove its destruction positively, or that it has been thrown aside as useless;¹¹ or that its destruction was the result of an accident, or was without the consent of the party who seeks to show its contents. When it appears that the best evidence has been voluntarily and intentionally destroyed, all inferior evidence of its contents will be rejected. But if

¹ *Ohio S. R. Co. v. Morey*, 47 Ohio St. 23.

² *Boone v. Alexander City (Ala.)*, 7 S. Rep. 437; *Abbott v. Stanley*, 77 Tex. 309.

³ *McKay v. Lasher*, 121 N. Y. 477; 31 N. Y. State Rep. 690.

⁴ *O'Donnell v. Johns*, 76 Tex. 362.

⁵ *Frost v. Wolf*, 77 Tex. 455; *Hill v. Taylor*, id. 295; *Sanger v. Merritt*, 120 N. Y. 109; 30 N. Y. State Rep. 870; *Cable v. Cable*, 146 Pa. St. 451; *James v. Sammis*, 132 N. Y. 239; 43 N. Y. State Rep. 910; *Crain v. Huntington*, 81 Tex. 614; *Caltrane v. Lamb*, 109 N. C. 209; *McKay v. Arm-*

strong, 84 Tex. 157; *Ballard v. Carmichael*, 83 id. 355; *McClaskey v. Barr*, 47 Fed. Rep. 154.

⁶ *Gillis v. Wilmington, O. & E. C. R. Co.*, 108 N. C. 441.

⁷ *Atwell v. Lynch*, 38 Mo. 519; *Taylor on Ev.*, § 316.

⁸ *Huckenstein v. Kelly & J. Co.*, 139 Pa. St. 201; *Bone v. State*, 86 Ga. 108; *Yost v. Mensch*, 141 Pa. St. 73.

⁹ *Adams v. Guice*, 30 Miss. 397.

¹⁰ *Blake v. Frost*, 44 Ill. 102; *Smith v. Holyoke*, 112 Mass. 517; *Randolph v. Lane*, 57 Ind. 115.

¹¹ *Bagley v. Mickle*, 9 Cal. 430.

the destruction was made upon an erroneous impression of its effect, secondary evidence will be allowed.¹ There are no degrees of secondary evidence so as to require a party authorized to resort to it to choose one class of such evidence rather than another.² A certified copy of records, books or papers in offices are evidence equally with the original thereof.³ The original of a deed duly recorded need not be produced.⁴ If an original conveyance is a record of another state and cannot be produced, a copy shown to be a true copy of the record is admissible.⁵ An order used twelve years before the trial will be presumed to be lost.⁶ The contents of a letter written to a person residing in another state may be proven by secondary evidence without proving its loss or destruction.⁷ Where a dying declaration is made and reduced to writing and sworn to by the declarant, but the accused procures the rejection of the writing, he cannot object to oral testimony detailing what deceased then said, provided it is shown that the statement was made under the conditions necessary to render a statement admissible as a dying declaration.⁸ A copy of a message sent by telegraph is not competent evidence, unless the original dispatch, left at the transmitting office, is shown to have been destroyed or lost, or that the original, and the office from which it was sent, are beyond the jurisdiction of the court. This may be understood, however, as applying only to cases where the telegram is relied upon to sustain the action or to establish a substantial fact.⁹ The message must be shown to have been sent by the party from whom it purports to have come, either by proof that it was in his handwriting or that it was sent by his direction or authority.¹⁰ But it is evident that this rule cannot have general application, as there are instances in which the message received must be deemed the original; and in all cases where

¹ Stoddard v. Mix, 14 Conn. 12; ⁶ Daniels v. Smith, 130 N. Y. 696; Rhode v. McLean, 101 Ill. 467. 28 N. Y. State Rep. 351.

² Com. v. Smith, 153 Mass. 97.

⁷ Manning v. Maroney, 87 Ala. 563;

³ Culver v. Uthe, 133 U. S. 655; 13 Am. St. Rep. 67.

Robertson v. Du Bose, 76 Tex. 1.

⁸ Hines v. Com., 11 Ky. L. Rep. 865.

⁴ Keller v. Ashford, 133 U. S. 610;

⁹ Smith v. Easton, 54 Md. 133; 39 Am. Rep. 355.

Lasatere v. Van Hook, 77 Tex. 650;

Texas M. Pres. Co. v. Locke, 74 id. 370.

¹⁰ United States v. Babcock, 3 Dill. (U. S.) 576; Whilden v. Merchants' Bank, 64 Ala. 1.

⁵ Frost v. Wolf, 77 Tex. 455.

the company can be considered the agent of the sender, the message as received, in all questions between the sender and the person receiving it, is treated as the original.¹

§ 24. **Memoranda.**—The memorandum of a witness becomes evidence only when he verifies it as having been true when made, has since forgotten the transaction, and is not able to recall it after examining the memorandum so as to state it from memory.² The stubs of a check-book are competent as tending to show payment of a debt.³ Mortuary tables are evidence to show the expectancy of life.⁴ Standard mortality tables are admissible in evidence to show the probable duration of life of a healthy person, and are to be weighed with other evidence, such as his physical condition, general health, vocation, habits, and the like, in an action for personal injuries.⁵ Ballots and ballot-boxes are competent evidence.⁶

§ 25. **Oral proof of the contents of a deposition.**—Where a person is examined before a court or officer, and his deposition is reduced to writing and signed by the affiant, such deposition is the best evidence of the witness' statement; and no statement made by him and not contained therein is part thereof. If such witness is examined, and his examination reduced to writing and not subscribed by him, undoubtedly any person who heard his examination could testify to any statements made by him, and such written examination would not be the primary evidence. So any person who hears a witness testify upon a trial, although the evidence is taken down by a stenographer, may undoubtedly testify to statements made by the witness. But when the examination is reduced to writing and read over to and subscribed by the witness for the purpose of making an accurate and reliable record of the evidence given by him, then the examination

¹ Weaver v. Wood, 36 N. Y. 307.

Mich. 513; Lincoln v. Smith (Neb.),

² Pinkham v. Bento, 67 N. H. 687;

45 N. W. Rep. 41.

Coffey v. Lyons, 32 N. Y. State Rep.

66; Ayers v. Harris, 77 Tex. 108;

Passmore v. Passmore, 60 Mich. 463.

³ McGinty v. Henderson, 41 La.

Ann. 382.

⁴ North Eastern R. Co. v. Chandler

(Ga.), 10 S. E. Rep. 586; Gorman v.

Minneapolis & St. L. R. Co., 78 Iowa,

509; Hunn v. Michigan C. R. Co., 78

⁵ Richmond & D. R. Co. v. Hissong

(Ala.), 13 S. Rep. 209; Mary Lee

Coal Co. v. Chambliss, 53 Am. &

Eng. R. Cas. 254; Townsend v.

Briggs (Cal.), 32 Pac. Rep. 307; Green

v. Louisville & N. R. Co., 14 Ky. L.

Rep. 876.

⁶ Gibson v. Trinity County, 80 Cal.

359; Hunnicutt v. State, 75 Tex. 233.

thus subscribed is the primary evidence, and it would violate the fundamental rules of evidence to permit witnesses to be called and give from their memory evidence of statements thus made.¹ A referee having in his possession an examination made by him of a judgment debtor in supplementary proceedings which was reduced to writing and read to and subscribed by the debtor cannot testify to the latter's statements upon such examination, the written examination itself being the best evidence.² And a witness cannot refresh his memory by the use of a copy of memoranda made by him, without accounting for the absence of the original.³ So where an auctioneer's memorandum becomes important, the original alone is sufficient to establish the sale, and a mere copy thereof is not admissible.

§ 26. **Demonstrative evidence.**—Evidence by experiment or demonstrations is proper when they are made under similar conditions and like circumstances to those existing in the case at issue;⁴ and whether articles proposed to be exhibited in court are too cumbersome or not is a question within the discretion of the presiding judge.⁵ Thus, on the prosecution for the theft of a cow, pieces of ears and dew laps cut from some cow, and a hide sold by defendant, are admissible in evidence for the purpose of identifying an animal which the evidence showed he had killed.⁶ On a prosecution for rape the under-clothing which prosecutrix claims was on her person and torn by defendant is competent.⁷ So is clothing worn by deceased on a prosecution for shooting.⁸ So a matron may make an examination of a woman suing for divorce on the ground of malformation or abnormal physical proportions, amounting to physical incapacity.⁹ A map or diagram, or picture, verified as a correct representation of physical objects, is admis-

¹ *People v. Hinchman*, 75 Mich. 587; *Kain v. Larkin et al.*, 131 N. Y. 300; 43 N. Y. State Rep. 197.

² *Kain v. Larkin*, 131 N. Y. 300; 43 N. Y. State Rep. 197.

³ *Byrnes v. Pacific Exp. Co. (Tex.)*, 15 S. W. Rep. 46; *Seattle Land Co. v. Day*, 2 Wash. 451; *Alabama M. R. Co. v. Coskey*, 92 Ala. 254.

⁴ *Leonard v. Southern P. Co.*, 21 Oreg. 555.

⁵ *Jackson v. Pool*, 91 Tenn. 448.

⁶ *State v. Crow*, 107 Mo. 341; *Title v. State*, 30 Tex. App. 597; *Michael v. State*, 94 Ala. 68; *State v. Robinson*, 35 S. C. 340; *Richards v. State*, 82 Wis. 172; *People v. Wright*, 89 Mich. 70.

⁷ *McMurrin v. Rigley (Iowa)*, 45 N. W. Rep. 877.

⁸ *Levy v. State*, 28 Tex. App. 203.

⁹ *Anonymous (Ala.)*, 7 S. Rep. 100.

sible in evidence for the use of the witnesses in explaining their evidence and to enable the jury to better understand the case.¹ So a map of a building set on fire, and of the adjoining and surrounding premises, is competent on a prosecution for arson.² So an expert witness testifying to handwriting may make illustrations on the blackboard, before the jury, for the purpose of explaining his testimony.³ The jury may be allowed to view the premises in dispute,⁴ but it is always a matter in the discretion of the court whether they will grant or refuse to allow the jury to inspect the premises.⁵ In bastardy the child may be exhibited to the court or jury in support of other testimony.⁶ So, on a trial for burglary, a mask, lantern, and other implements of burglary may be used to enable witnesses to describe and illustrate the appearance of the burglar at the time of the commission of the offense. On a trial for homicide a bullet taken from the body of the deceased is competent evidence. A pistol and cartridges found on the person of the defendant accused of murder, at the time of his arrest, are competent evidence.⁷

§ 27. **Physical examination.**—In an action for personal injuries the plaintiff may exhibit his limbs to the jury for the purpose of showing their condition; and a physician may exhibit to the jury the plaintiff in his then condition, and place him in different attitudes for the purpose of enabling them to determine the extent of his disability;⁸ and a party may be compelled to exhibit his alleged injured limbs to a jury.⁹ When a plaintiff as a witness in an action for an injury exhibits his injured member as a part of his direct examination, it is for the purposes of the trial made the property of

¹ *Adams v. State*, 28 Fla. 511.

⁶ *Crow v. Jordan*, 49 Ohio St. 655.

² *People v. Cassidy*, 133 N. Y. 612;
44 N. Y. State Rep. 869.

⁷ *Com. v. Tibbetts*, 157 Mass. 519.

³ *McKay v. Lasher*, 31 N. Y. State Rep. 690; 121 N. Y. 477; *Dryer v. Brown*, 52 Hun, 321; 23 N. Y. State Rep. 695.

⁸ *Citizens' Street R. Co. v. Willoebey (Ind.)*, 33 N. E. Rep. 627; *Cunningham v. Union Pacific R. Co.*, 4 Utah. 206; *Hess v. Lowery*, 122 Ind. 225; *Townsend v. Briggs (Cal.)*, 32 Pac. Rep. 307.

⁴ *Bedell v. Berkey*, 76 Mich. 435;
Topeka v. Martineau, 42 Kan. 387.

⁹ *Graves v. Battle Creek*, 95 Mich.

⁵ *Stewart v. Cincinnati, W. & M. R. Co.*, 89 Mich. 315; *St. Louis, A. & T. H. R. Co. v. Claunch*, 41 Ill. App. 592; *Andrews v. Youmans*, 82 Wis.

266; *Winner v. Lathrop*, 51 N. Y. State Rep. 258; 67 Hun, 511. But see *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 227.

the court and opposite party for the purpose of cross-examination, and in case of refusal to submit to an examination of such injured member by the plaintiff, his evidence, so far as that exhibit and explanation of the same by the plaintiff is concerned, must be stricken out on defendant's motion.¹

§ 28. **Photographs, etc.**— Courts may notice judicially that all civilized communities rely upon photographic pictures for taking and presenting resemblances of persons and animals, of scenery and all natural objects, of buildings and other artificial objects. It is of frequent occurrence that fugitives from justice are arrested on the identification given by them. They are the signs of the thing taken. A portrait or a miniature taken by a skilled artist, and proven to be an accurate likeness, would be received on a question of the identity or the appearance of a person not producible in court. Photographic pictures do not differ in kind of proof from the pictures of a painter. They are the product of natural laws and a scientific process.² It is true that in the hands of a bungler, who is not apt in the use of the process, the result may not be satisfactory. Somewhat depends for exact likeness upon the nice adjustment of machinery, upon atmospheric conditions, upon the position of the subject, the intensity of the light, the length of the sitting. It is the skill of the operator that takes care of these, as it is the skill of the artist that makes correct drawing of feature and nice mingling of tints, for the portrait. Most of evidence is but the signs of things. Spoken words and written words are symbols. Once a deaf-mute, born so, was presumed in law an idiot;³ but later days look upon him as not incompetent to be a witness, if he in fact have understanding and knows the nature of an oath.⁴ He is now taught to give ideas to his fellow-men by signs, and his deprivation of some of the common faculties of humanity does not exclude him from the witness-box. The signs he makes must be translated by an interpreter skilled and sworn. So the signs of the portrait and the photograph, if authenticated by other testimony, may give truthful representations. When shown by such testimony to be correct resemblance of a person, they

¹ Winner v. Lathrop, 67 Hun, 511; ³ 1 Hale, 84.

51 N. Y. State Rep. 258.

⁴ Ruston's Case, 1 Leach Cr. Cas.

² Bedell v. Berkley, 76 Mich. 435; 408.

Keyes v. State, 122 Ind. 526.

may be shown to the triers of the facts, not as conclusive, but as aids in determining the matter in issue,—still being open, like other proofs of identity or similar matter, to rebuttal or doubt. A witness who speaks to personal appearance or identity tells in more or less detail the *minutia* thereof as taken by his eye. What he says is a description thereof by one mode of signs—by words orally uttered. If his testimony be written instead of spoken, and is offered as a deposition, it is a description in another mode of signs—by words written; and the value of that mode, the deposition, depends upon the accuracy with which his words uttered are put into words written. Now if he has before him a portrait or a photograph of the person, and it shows to him a correct copy of that person, if it produce to his view a correct description, which he testifies is a likeness, why may not that be given to the jury as a description of the person by the witness in another mode of signs? The portrait and the photograph may err, and so may the witness. That is an infirmity to which all human testimony is lamentably liable.¹ A photograph is admissible in evidence, although its correctness is not proved by the photographer who made it, where a person familiar with the premises, a person or thing, after examining it, testifies that it correctly describes the same and is correct.² So it seems that a photograph of the scene of an accident is admissible, although the situation had been changed before it was taken.³ So photographs of premises are admissible where an inspection of the premises by a juror is proper but impracticable.⁴ Such photographs may be used by witnesses in explaining their testimony.⁵ A photograph of a defendant is competent to show that he wore different clothes or whiskers at a prior time.⁶

¹ *Alberti v. New York, L. E. & W. R. Co.*, 118 N. Y. 77; 27 N. Y. State Rep. 865.

² *Rosevelt Hospital v. New York El. R. Co.*, 66 Hun, 633; 50 N. Y. State Rep. 456.

³ *Stott v. New York, L. E. & W. R. Co.*, 50 N. Y. State Rep. 500.

⁴ *Omaha S. R. Co. v. Berson*, 36 Neb. 89.

⁵ *Ortiz v. State*, 30 Fla. 256; *Turner v. Boston & M. R. Co.*, 158 Mass. 261.

⁶ *Com. v. Morgan*, 34 N. E. Rep. 458; *Com. v. Connors*, 156 Pa. St. 147; *State v. Ellwood*, 17 R. I. 763; *United States v. Pagliano*, 54 Fed. Rep. 1001; *People v. Webster*, 68 Hun, 11; 52 N. Y. State Rep. 233; *Stott v. New York El. R. Co.*, 50 N. Y. State Rep. 500.

CHAPTER IX.

PAROL EVIDENCE CONCERNING WRITINGS.

<p>I. PAROL EVIDENCE CONCERNING WRITINGS.</p> <p>§ 1. In general.</p> <p>2. Contemporaneous parol contract — Presumptions as to.</p> <p style="text-align: center;">II. SEALED INSTRUMENTS.</p> <p>3. Actions at law.</p> <p>4. Equity actions.</p> <p style="text-align: center;">III. EVIDENCE FOR THE INTERPRETATION OF DOCUMENTS.</p> <p>5. In general.</p> <p>6. Illustrations.</p> <p style="text-align: center;">IV. TIME OF PERFORMANCE.</p> <p>V. TO IDENTIFY A SUBJECT OR PERSON.</p> <p>VI. TO SHOW INTENTION OF PARTIES.</p> <p>7. Illustrations.</p>	<p>VII. TECHNICAL TERMS EXPLAINED BY PAROL.</p> <p>§ 8. Forms of expression.</p> <p style="text-align: center;">VIII. LATENT AMBIGUITIES.</p> <p>9. In construction of will.</p> <p style="text-align: center;">IX. PATENT AMBIGUITIES.</p> <p style="text-align: center;">X. CUSTOM AND USAGE.</p> <p>10. In general.</p> <p>11. Illustrations.</p> <p>12. Qualities of.</p> <p>13. When not necessarily general.</p> <p>14. How established.</p> <p>XI. LOCAL USAGE — NOTICE OF MUST BE SHOWN.</p> <p style="text-align: center;">XII. WHEN CUSTOM NOT VALID.</p> <p style="text-align: center;">XIII. MEANING OF WORDS INTERPRETED BY USAGE.</p> <p>XIV. ADDING INCIDENT TO CONTRACT.</p>
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I. PAROL EVIDENCE CONCERNING WRITINGS.

§ 1. **In general.**— As a general rule, in the absence of latent ambiguity therein, parol evidence is not admissible to explain, vary or contradict a written instrument, as between the parties thereto or their privies.¹ Portions of this rule are stated by Sir J. Stephen, in his Digest of the Law of Evidence,² as follows: “When any judgment or other judicial or official proceeding, or any contract or grant, or any other disposition of

¹ *Pierson v. Arkenburgh*, 36 N. Y. State Rep. 82; 126 N. Y. 668; *Hair v. Johnson*, 35 Ill. App. 562; *Hancock v. Cossett*, 45 Fed. Rep. 754; *Davis v. Stout*, 126 Ind. 12; *Meier v. Kelly*, 20 Oreg. 86; *Ellis v. Darden*, 86 Ga. 368; *Re Keleman's Will*, 126 N. Y. 73; 36 N. Y. State Rep. 390; *Lancaster Mills v. Merchants' Cotton Press & S. Co.*, 89 Tenn. 1.

² Art. 90.

property, has been reduced to the form of a document or series of documents, no evidence can be given of such judgment or proceeding, or of the terms of such contract, grant or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible. Nor can the contents of any such document be contradicted, altered, added to or varied by oral evidence; provided, that any of the following matters may be proved:

“(1) Fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated,¹ want or failure of consideration, or mistake in fact or law, or any other matter which, if proved, would produce any effect upon the validity of any document or of any part of it, or which would entitle any person to any judgment, decree or order relating thereto.²

“(2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.³

“(3) The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property.⁴

“(4) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, provided that such agreement is not invalid under the statute of frauds or otherwise.⁵

“(5) Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description, unless the annexing of such incident to such con-

¹ *Reffell v. Reffell*, L. R. 1 P. & D. 139.

² *Union Mutual Ins. Co. v. Wilkinson*, 13 Wall. 222, 231; *Bank of U. S. v. Dunn*, 6 Pet. 51, 57; 2 Whart. Ev., §§ 930-935, 937. As to date, see *Deakins v. Hollis*, Adm'r, 7 C. & J. 311, 316.

³ *Fusting v. Sullivan*, 41 Md. 162, 169; *Hutchins v. Hibbard*, 34 N. Y. 24, 26.

⁴ *Shughart v. Moore*, 78 Pa. St. 469, 472; *Pike v. Fay*, 101 Mass. 134, 136.

⁵ *Monroe v. Perkins*, 9 Pick. 298, 302; *Russell v. Barry*, 115 Mass. 300, 302.

tract would be repugnant to or inconsistent with the express terms of the contract.¹

Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, or other disposition of property.² Oral evidence of the existence of a legal relation is not excluded by the fact that it has been created by a document, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established or is carried on.³ The fact that a person holds a public office need not be proved by the production of his written or sealed appointment thereto, if he is shown to have acted in it."⁴

§ 2. Contemporaneous oral contract—Presumption as to.—As a general rule the law presumes that a written contract merges all prior and contemporaneous negotiations and oral promises in reference to the same subject, and that when the terms of an instrument are in writing, the rights and duties of the parties depend upon the terms and legal intentment of the instrument itself; that the whole agreement of the parties, and the extent and manner of the undertaking, are embraced in the writing. The rule is the same in equity as at common law; and although in equity a written contract may be set aside or reformed for fraud or mistake, it cannot be controlled by evidence that it was executed on the faith of a contemporaneous or preceding oral stipulation not embraced in it; nor can it be set aside on the ground that such oral stipulation has not been performed, unless it is also shown that the stipulation has been omitted by mistake. Thus the courts, recognizing that memory has natural defects, besides being subject to be warped and twisted by bias, and being liable in the face of self-interest to substitute strained and unwarranted inferences for the language used, have declared a general rule applicable to this subject: that the presumption of

¹ *Bliven v. New England Screw Co.*, 23 How. (U. S.) 420; *Thompson v. Riggs*, 5 Wall. 663, 679; *Moran v. Prather*, 23 id. 492, 503.

² *Keene v. Meade*, 3 Pet. 1, 7; *Cramer v. Shriner*, 18 Md. 147; 1 Whart. Ev., § 11.

³ *Dutton v. Woodman*, 9 Cush. 255, 262; *Spiers v. Willison*, 4 Cranch, 398; 1 Whart. Ev., §§ 78, 1315-18.

⁴ 1 Ph. Ev. 449-50; T. E. 139; *Bank of U. S. v. Dandridge*, 12 Wheat. 64, 70; *McCay v. Curtice*, 9 Wend. 17.

law is that a contract reduced to writing contains the whole of the agreement, and that oral representations and stipulations differing from and not inserted in it will not be admitted to add to or take from, vary or modify the written agreement. The object of the rule is to protect the parties to the contract from bad memories and bad faith. The exception of which the largest number of the authorities treats is based upon the imperfection of language and the inadequate manner in which people adjust words to the facts to which they apply. Another exception is where the instrument does not purport to be the complete and entire contract of the parties; as where the writing shows on its face that it does not embody the entire contract, or where it was executed merely to carry out some provision of an oral contract embracing a wider field than that covered by the writing, or relates only to a separable and distinct part of such contract, or to a collateral matter.¹ But a written instrument is held to contain the entire agreement where on its face it appears to be, though it is not in fact, complete, and it is not shown that its appearance of completeness results from fraud, accident or mistake; and parol evidence is inadmissible to show that one of several transactions attempted to be reduced to writing by such instrument is not embraced therein.² Thus, where there is no fraud or mistake in the preparation of the instrument, and it appears that the party knew its effect and purport, there is no ground for the reformation of the contract, and a contemporaneous promise on the faith of which he signed cannot be given in evidence to control it.³

A different rule has long prevailed in Pennsylvania, and it has there been held that everything that passes at the time of the execution of a deed is admissible in evidence; and that although there be no fraud or mistake in the execution of the instrument, yet if its execution was obtained by means of a contemporaneous verbal stipulation, this may be given in evidence, because it would be a fraud to enforce the instrument without performing the stipulation. It was thus held in *Christ v. Dif-*

¹ *Smith v. Wood* (Ind.), 32 N. E. 63 Conn. 520; *Wiley v. Calf H. Co.* Rep. 931. (Cal.), 32 Pac. Rep. 522.

² *Willis v. Byars* (Tex. Civ. App.), 21 S. W. Rep. 320; *Averill v. Sawyer*, ³ *Wilson v. Dean*, 74 N. Y. 531.

fenbach¹ that a verbal stipulation, made at the time of the execution of a lease, should be enforced. The cases declaring this doctrine are very numerous, and it has been carried so far as to hold that, in an action against a surety upon a bond, he may, as a defense, show that he executed it under a verbal declaration by the obligee that his signing was a mere matter of form, and that he should never be called upon for payment. It is certain that in many of the states such a doctrine has never been adopted, and that the current of authorities sustains the proposition that, both at law and in equity, one who sets his hand and seal to a written instrument, knowing its contents, cannot be permitted to set up that he did so in reliance upon some verbal stipulation, made at the time, relating to the same subject, and qualifying or varying the instrument which he thus signs. The very purpose of the rule which excludes evidence of such declarations is to avoid the uncertainties attendant upon such evidence, and equity will not set aside that important and well-settled rule for the purpose of relieving a party against a risk which he has voluntarily incurred. Thus, it is not competent to aver or prove that a note drew only six per cent. interest, where the note expressly fixes the rate at ten per cent.; nor that a will was executed in contemplation of marriage; nor to show the purpose or object of a subscription to pay a certain sum of money upon certain work being completed.² Parol evidence is inadmissible to explain a written contract or to show the intention of the parties when the contract is free from doubt.³ Thus, a party cannot prove by parol that his absolute undertaking in writing was not to be binding upon him.⁴ So, where a note is payable upon demand, parol testimony is not admissible to show that it was agreed that it should not be payable until a given event happened;⁵ or to show that a note, payable on a day certain, was to be paid on a contingency only.⁶ Where a contract for the sale of goods is silent as to the time of delivery, the law

¹ 1 Serg. & Rawle, 464.

State Rep. 82; 126 N. Y. 668; Davis

² Stillings v. Trimmings, 152 Mass. 147; Rhodes v. Newhall, 126 N. Y. 474; 38 N. Y. State Rep. 431; Hetzler v. Morrell, 82 Iowa, 562.

v. Stout, 126 Ind. 12.

⁴ Westbrook v. Howell, 34 Ill. App. 571.

⁵ Davis v. Stout, 126 Ind. 12

³ Pierson v. Arkenburgh, 36 N. Y.

⁶ Brown v. Wiley, 20 How. (U. S.)

implies a contract to deliver in a reasonable time, and oral evidence of an agreement to take them away at once is inadmissible.¹ So a contract of sale, silent as to the time of payment, implies payment on delivery, and proof of intended credit is inadmissible.²

II. SEALED INSTRUMENTS.

§ 3. Actions at law.—In an action at law upon a sealed instrument executed by one party in the absence of anything in the instrument indicating that it was done for another, evidence cannot be received to bring in, or enforce the covenant against, any other person, but the rights and obligations of the parties must be determined according to the language and import of the agreement as it may have been made and sealed by the parties.³

§ 4. Equity actions.—But the rule is different in equity, for the fact of a purchase of real property being made in the name of one partner will not preclude the firm from proving that the purchase was made in reality by and for its benefit. In adopting, following and applying this principle, the courts observe the liberal practice sustained and adhered to in equity. It declines to be bound by technical legal rules, and endeavors to discover and enforce the transactions of parties as they themselves have framed them and design they should be carried into effect. The relief to be awarded adapts itself to the special circumstances of each particular case, adjusting all cross-equities and bringing all the parties in interest before the court. Courts of equity do not regard the forms of instruments, but they look to the intent, and give to the acts of the parties the construction which that intent justifies and requires, and will wholly disregard the form of the transaction and look to the substance.⁴

442; *Fay v. Blackstone*, 31 Ill. 538; 215; *Crawford County v. Coppock*,
Dike v. Arnold (Mich.), 44 N. W. Rep. 79 Iowa, 482; *Smith v. Taylor*, 82
 407; *Smith v. Taylor*, 82 Cal. 533; Cal. 533; *Walton v. Agricultural Ins.*
Walton v. Agricultural Ins. Co., 116 Co., 116 N. Y. 317; 26 N. Y. State
 N. Y. 317; 26 N. Y. State Rep. 780. Rep. 780.

¹ *Lindengren Furniture Co. v. Mead*
 (Minn.), 44 N. W. Rep. 306.

² *Kessler v. Smith*, 42 Minn. 494;
Patterson v. Ramspeck, 81 Ga. 808;
Hyatt v. State (Ark.), 13 S. W. Rep.

³ *Briggs v. Partridge*, 64 N. Y. 357;
Williams v. Gillies, 75 id. 197.

⁴ *Fairchild v. Fairchild*, 64 N. Y.
 471; *Stoddard v. Whitney*, 46 id. 627.

III. EVIDENCE FOR THE INTERPRETATION OF DOCUMENTS.

§ 5. **In general.**— Sir J. Stephen, in his Digest of the Law of Evidence,¹ lays down the following rule for the interpretation of documents:

(1) In order to ascertain the meaning of the signs and words made upon a document, oral evidence may be given of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical and provincial expressions, of abbreviations and of common words which, from the context, appear to have been used in a peculiar sense;² “but evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.”³

(2) “If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say.”⁴

(3) “In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers or may probably have been intended to refer, or which identifies any person or thing mentioned in it.”⁵

(4) “If the words of a document have a proper legal meaning, and also a less proper meaning, they must be deemed to have their proper legal meaning, unless such a construction would be unmeaning in reference to the circumstances of the case, in which case they may be interpreted according to their less proper meaning.”⁶

(5) “If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly, and evidence to show that the author intended to express some other meaning is not admissible.”⁷

(6) “If the document applies in part but not with accuracy to the circumstances of the case, the court may draw inferences

¹ Art. 91.

² *Stoops v. Smith*, 100 Mass. 63, 66; *Bank of U. S. v. Dunn*, 6 Pet. 51; *Thorington v. Smith*, 8 Wall. 1, 12; 2 *Whart. Ev.*, §§ 939, 940.

³ *Moran v. Prather*, 23 Wall. 492, 501.

⁴ *Peisch v. Dickson*, 1 Mason, 9; *Pingry v. Watkins*, 17 Vt. 379.

⁵ *Reed v. Insurance Co.*, 95 U. S. 23, 30; *Maryland v. B. & O. R. R. Co.*, 22 Wall. 105, 113.

⁶ *Reynolds v. Com. F. Ins. Co.*, 47 N. Y. 597, 605; *The Confederate Note Case*, 19 Wall. 548, 559.

⁷ *Pindar v. Resolute F. Ins. Co.*, 47 N. Y. 115, 117; *Reynolds v. Com. F. Ins. Co.*, id. 597, 605.

from those circumstances as to the meaning of the document, whether there be more than one or only one thing or person to whom or to which the inaccurate description may apply. In such cases no evidence can be given of statements made by the author of the document as to his intentions in reference to the matter to which the document relates, though evidence may be given as to his circumstances, and as to his habitual use of language or names for particular persons or things.”¹

(7) “If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates.”²

(8) “If the document is of such a nature that the court will presume that it was executed with any other than its apparent intention, evidence may be given to show that it was in fact executed with its apparent intention.”³

§ 6. **Illustrations.**—(1) The general rule is that, whenever there is a complete written agreement, all previous conversations and verbal agreements of the parties are merged therein, and cannot be shown to alter or vary the writing or to show the intention of the parties, except where there is a latent ambiguity in the contract.⁴

(2) Parol evidence is admissible to show that certain words used in a contract have a technical, commercial meaning, in view of which the parties contracted, and to show what that meaning is,⁴ not for the purpose of altering the contract, but of ascertaining what the real contract is and of enforcing it as the parties intended it should be.⁶

(3) Parol evidence is admissible to show that the phrase, “to

¹ *Atkinson's Lessee v. Cummins*, 9 How. (U. S.) 479, 486; *Reed v. Insurance Co.*, 95 U. S. 28, 30; *Langlois v. Crawford*, 59 Mo. 456, 466.

² *Lycoming Mutual Ins. Co. v. Sailer*, 67 Pa. St. 108, 112; *Ryerss v. Wheeler*, 22 Wend. 148, 150; *Burr v. Broadway Ins. Co.*, 16 N. Y. 267.

³ *Graves v. Spedden*, 46 Ind. 527, 533; *Woolery v. Woolery*, 29 Ind. 249, 253.

⁴ *Schmohl v. Fiddick*, 34 Ill. App. 190; *Edwards v. Clark*, 83 Mich. 246; *Van Vleet v. Sledge*, 45 Fed. Rep. 743; *Schroeder v. Frey*, 37 N. Y. State Rep. 945.

⁵ *Long v. J. K. Armsby Co.*, 43 Mo. App. 253.

⁶ *Schmohl v. Fiddick*, 34 Ill. App. 190; *Missouri, K. & T. R. Co. v. Graves* (Tex. App.), 16 S. W. Rep. 102; *Clay v. Field*, 138 U. S. 464.

be taken by January 1st, 1883, on dock in New York," means that the goods are to be delivered as the purchaser shall from time to time order, and if not taken by the specified time a bill is to be forwarded for the balance, and, if paid by the purchaser, the goods are to be held in store subject to his order.¹

(4) A written contract silent or ambiguous as to certain matters may as to them be explained by parol evidence not conflicting with anything plainly expressed in the contract.²

(5) Extrinsic facts and circumstances showing the practical interpretation placed by the parties upon an ambiguous expression used in the contract are admissible in evidence.³

(6) Parol evidence as to the conversation between the parties to a contract, prior to making it, is admissible to explain indefinite and uncertain phrases contained therein.⁴

(7) It is allowable to show what certain words mean; as, to show what is meant by the words "good custom cowhide boots," "good merchantable shipping hay."⁵

(8) It is not allowable to permit parol evidence to go beyond the purpose of aiding in the interpretation of a written instrument, and show that the subject thereof was other and different from that described in the instrument.⁶

IV. TIME OF PERFORMANCE.

The authorities are clear that, where the written contract is silent as to the time of performance, the law implies that it should be performed in a reasonable time, and evidence of a contemporaneous oral agreement is inadmissible to vary the construction to be legally implied from the writing itself.⁷ Thus, where a contract in writing for the sale of property or the payment of money states no time for performance, the

¹ *Atkinson v. Truesdell*, 38 N. Y. State Rep. 159; 127 N. Y. 230. *Lock v. Rowell*, 47 N. H. 46; *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453;

² *Johnson v. Patterson* (Ga.), 13 S. E. Rep. 17; *Beakis v. DaCunha*, 37 N. Y. State Rep. 14. *Hatch v. Douglass*, 48 Conn. 116; 40 Am. Rep. 154.

³ *Cosper v. Nesbit*, 25 Pac. Rep. 866; *Ellis v. Harrison*, 104 Mo. 270. ⁶ *Landers v. Cooper*, 115 N. Y. 279; 26 N. Y. State Rep. 272.

⁴ *Cassidy v. Fontham*, 38 N. Y. State Rep. 177 (1891); *J. K. Armsby Co. v. Eckerly*, 42 Mo. App. 299. ⁷ *Pope v. Terre Haute Car & Mfg. Co.*, 107 N. Y. 61; 11 N. Y. State Rep. 209; *Morowske et al. v. Rohrig*, 53 N. Y. State Rep. 220 (1893); *Driver v. Ford*, 90 Ill. 595.

⁵ *Fitch v. Carpenter*, 43 Barb. 40;

law implies that performance is to be made within a reasonable time, and the implication cannot be rebutted by extrinsic testimony going to fix a definite time, because this varies the contract.¹ Thus, a written promise to pay money, no time being expressed, means a promise to pay it on demand, and evidence that payment at a future day was intended is not admissible.²

V. TO IDENTIFY SUBJECT OR PERSON.

(a) Parol evidence is admissible to identify and apply the subject-matter of a contract,³ so as to satisfy the description contained therein, even when appearing on its face to be perfectly intelligible.⁴ Thus, such evidence is admissible to identify the parties to an instrument or record, as where there are two persons by the same name, to show which was intended;⁵ or that a contract made by a person in his own name was made as the agent of another;⁶ or that a contract is that of a corporation, though on its face the contract is that of a firm of a like name;⁷ or whose money paid for the land, the title to which was taken in the name of another than the payor;⁸ or to vary the effect of entries in bank books and on depositor's bank pass-book in respect to the ownership of the deposits;⁹ or that a party to an instrument was a surety.¹⁰

(b) The test of the admissibility of evidence *dehors* a deed is whether it tends to so explain some descriptive word or expression as to show that such phraseology, otherwise of doubtful import, contains in itself, with such explanation, an identification of the land conveyed;¹¹ and the same rule holds good of all written instruments, — as to identify the property

¹ 2 Pars. on Cont. 794.

² Boehm v. Lies et al., 46 N. Y. State Rep. 26 (1892).

³ Dowling v. Salliotte, 83 Mich. 131; Schofield v. Jones, 85 Ga. 816; 42 Alb. L. J. 418; Enliss v. McAdam, 108 N. C. 507.

⁴ Shinker v. Haagsma, 99 Mo. 208.

⁵ State v. Weare, 38 N. H. 314; Sawyer v. Boyle, 21 Tex. 28; Walker v. Wells, 25 Ga. 141.

⁶ Barclay v. Puesley, 110 Pa. St. 13; Luna v. Mohr, 3 N. M. 56; Oel-

rich v. Ford, 21 Md. 489; Souhegan Nat. Bank v. Boardman, 46 Minn. 293; Northern Nat. Bank v. Lewis, 78 Wis. 475.

⁷ McClintock v. Hughes Bros. Mfg. Co. (Tex. App.), 15 S. W. Rep. 200.

⁸ Ducie v. Ford, 138 U. S. 587.

⁹ Kennebec Sav. Bank v. Fogg, 83 Me. 374.

¹⁰ Schofield v. Jones, 85 Ga. 816; 42 Alb. L. J. 418.

¹¹ Blow v. Vaughn, 105 N. C. 198.

covered by a chattel mortgage,¹ or the property excepted from a bill of sale,² or to show to what security a receipt for certain moneys paid referred.³

(c) Parol evidence is admissible, as between the immediate parties to a promissory note signed with the addition "Agt.," to show that it was understood between the parties that the maker signed only as agent, and the note was the obligation of the principal only.⁴ So it may be shown by parol that the payee of a note is agent of the plaintiff or defendant and that such note was taken as agent merely.⁵ It may also be shown that a party placed his name on a note as a witness to the signature of another person and not as indorser.⁶ But parol evidence is inadmissible to show for what purpose and to whom a deed was intended to pass title when the legal effect of the deed is readily ascertainable from its face.⁷

(d) Parol evidence is admissible to show that a written contract complete in all respects, executed and delivered by the person sought to be charged, was not in fact the contract between the parties, and that it was in fact executed and delivered for a particular purpose, and to show the real contract resting in parol.⁸

(e) Where a guaranty is made in writing that a wood-pulp machine will take care of all the pulp reduced from four "Scott grinders," and deliver the pulp fifty per cent. dry, and there is proof that Scott grinders are manufactured of varying capacity, parol evidence identifying the machines known as Scott grinders is essential. The fact that the grinders are of different productive capacity involves the further inquiry, to grinders of what capacity did the parties refer? This may be shown by parol. It simply makes intelligible what needs explanation; and, construing the written contract in light of

¹ Harris v. Allen, 104 N. C. 86; New Hampshire Cattle Co. v. Bilby, 37 Mo. App. 43.

² Buford v. Lonegan (Utah), 22 Pac. Rep. 164.

³ De Camp v. McIntire, 115 N. Y. 258; 26 N. Y. State Rep. 266.

⁴ Keidan v. Winegar, 95 Mich. 430; Kline v. Bank of Tescott, 50 Kan. 91.

⁵ Stockton Sav. & L. Ass'n v. Gid-

dings, 96 Cal. 84; 31 Am. St. Rep. 181.

⁶ Tomblor v. Reitz (Ind.), 33 N. E. Rep. 789.

⁷ Prichard v. James (Ky.), 20 S. W. Rep. 216; Steerla v. Kaiser (La. Ann.), 12 S. Rep. 839; Matthews v. Dubuque

Mattress Co. (Iowa), 54 N. W. Rep. 225. ⁸ O'Leary v. McDonough, 52 N. Y. State Rep. 270 (1893).

the explanation, full force may be given to all the words without adding to or detracting anything therefrom.¹

(f) Parol evidence is admissible to identify the property which is to pass under a written contract of sale, or a corporation which has executed a contract by a name other than that by which it was incorporated, or notes referred to in a contract, or to identify the sum included in a note with the interest due on a pre-existing debt, and that it was given for such interest; and to show where the metes and bounds of surveys were actually run and marked upon the ground. Where there is a conflict between the different calls in the patent, testimony which simply identifies the property which is to pass under a written contract of sale does not vary or contradict the terms of the contract.² But such evidence is not admissible to control or vary a description in a grant of land giving distinct and definite boundaries from which the land may be located.³

VI. TO SHOW INTENTION OF PARTIES.

The rule which precludes parol evidence to contradict or vary the terms of a written instrument has no application when the sole purport of the evidence is to ascertain the sense in which the words of a written instrument were used by the parties thereto.⁴ Thus, where the language of a written instrument is ambiguous, equivocal or susceptible of conflicting or varying interpretations, it is proper to ascertain the intention of the parties thereto from the facts and circumstances which induced its execution, and thereupon to enforce it in accord with such intention, and such facts and circumstances may be shown by parol. The office of parol evidence in such a case is not to alter the language of the instrument, but to ascertain the purposes to which the parties intended to apply it. In many cases the courts cannot decide that question upon the mere construction of the document itself, without

¹ Bagley & S. Co. v. The Saranac R. P. & P. Co., 48 N. Y. State Rep. 444. Russell v. Davis (Minn.), 53 N. W. Rep. 766; Kelly v. Leachman (Idaho), 33 Pac. Rep. 44.

² Lonergan v. Buford, 148 U. S. 581; 47 Alb. L. J. 454; Hopper v. Justice, 111 N. C. 418; Kernan v. Baham, 45 La. Ann. 741; Marmet Co. v. Archibald, 37 W. Va. 778; ³ Beardsley v. Crane (Minn.), 54 N. W. Rep. 740; Thompson v. Smith, 96 Mich. 258.

⁴ 1 Greenl. Ev., § 277.

looking at the surrounding circumstances to see what was the subject-matter which the parties had in contemplation when the instrument was made. It is proper to ascertain that for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the paper by words of mouth passing at the time, but as a part of the conduct of the parties, in order to determine what was the scope and object of the intended contract, and to fill up the instrument where it is silent. Having done that, the court can turn to the language of the instrument to see if that language is capable of being construed so as to carry into effect that which appears to have been really the intention of both parties.¹ Thus, where a literal performance is impossible or impracticable, or where the language is ambiguous or susceptible of more than one construction, or is vague or general, or inappropriate to express the true intent, extraneous evidence is admissible to explain, and an antecedent parol agreement may be received to point to the intent of the parties.²

§ 7. **Illustrations.**—(1) If the intention of parties to a deed or other instrument is doubtful or in any way ambiguous, evidence may be given concerning the subject-matter and purpose of the grant, and the circumstances surrounding the parties, when such proof does not conflict with the writing and is necessary to make it intelligible.³ Thus, a testator's intention as to a charitable bequest which does not accurately name or describe either of the claimants of the fund may be shown by circumstances.⁴ But the general rule is, that the intention or understanding of the parties to a written contract must be determined from the language of the contract.⁵ And the intent existing in the minds of the parties, not evidenced by their acts, cannot be shown by parol.⁶

(2) It is not necessary to the validity of a policy of insurance that the name of the assured should appear in the contract,

¹ Henry McShane Co. v. Padian, 48 Rep. 85; Sturgis v. Work, 122 Ind. N. Y. State Rep. 705. 134; Smith v. Kimball, 62 N. H. 696;

² Springsteen v. Sampson, 32 N. Y. 706; Stillwell v. St. Louis & H. R. Dodd v. Templeman, 76 Tex. 57.

Co., 39 Mo. App. 221; Schroeder v. Home (Mass.), 29 N. E. Rep. 645.

Frey, 131 N. Y. 562; 37 N. Y. State ⁵ Rigdon v. Conley, 141 Ill. 565.

Rep. 945; Kinck v. Kinck, 75 Va. 12. ⁶ Appolos v. Brady, 49 Fed. Rep.

³ Sire v. Rumbold, 39 N. Y. State 401.

but he may be described in other ways than by name; and if the description is imperfect or ambiguous, extrinsic evidence may be received to ascertain the meaning and intent of the parties in its use.¹

(3) Extrinsic evidence is admissible to show that an illegitimate and not a legitimate nephew of the same name was the person named as executor in a will, where the will refers to an illegitimate grandnephew as nephew and an illegitimate niece as niece.² So in a case of a clear misnomer of a charitable institution to which a bequest is made, parol evidence is admissible to show what institution was intended.

(4) Parol evidence is admissible to prove the circumstances under which a deed was made, or to which it relates, or to explain an ambiguity, intrinsic or extrinsic, or to show the situation of the subject of the deed or of the parties, in order to ascertain the premises intended to be conveyed;³ and extrinsic evidence is always admissible to explain the calls of a deed for the purpose of their application to the subject-matter, and thus give effect to the deed.⁴

(5) Upon an issue whether or not a bond signed had become a binding obligation, the alleged bondsmen may testify as to what was said and done at the time of signing.⁵ So it may be shown that one written instrument should be substituted for another in a suit upon the latter.⁶

(6) An order to ship goods to a proposed purchaser thereof, although apparently on its face an entire and complete contract, may be shown by parol evidence of the negotiations and circumstances upon which the order was given to have been only a part of the agreement under which goods were to be ordered and shipped as needed.⁷

¹ *Sauerbier v. Union Cent. L. Ins. Co.*, 39 Ill. App. 620; *Weed v. London & L. F. Ins. Co.*, 116 N. Y. 106; 26 N. Y. State Rep. 414.

² *Re Ashton* (1892), P. 83; 45 Alb. L. J. 335.

³ *Hicklin v. McClear*, 18 Oreg. 126.

⁴ *Thompson v. Southern California M. R. Co.*, 82 Cal. 497.

⁵ *State ex rel. Croy v. Gregory*, 132 Ind. 387.

⁶ *Guidery v. Green*, 95 Cal. 630; *Vanderlin v. Hovis*, 152 Pa. St. 11; *Rhyner v. Carver*, 84 Wis. 812.

⁷ *Bronson v. Herbert*, 95 Mich. 478; *Hamill v. Supreme Council of R. A.*, 152 Pa. St. 537; *Campbell v. Jimenes*, 52 N. Y. State Rep. 495 (1893).

VII. TECHNICAL TERMS EXPLAINED BY PAROL.

(1) It is not competent for a party to prove the meaning of a written instrument; he can only prove the peculiar meaning of technical words used, and, if words of universal use are used in a technical or peculiar sense, he may prove facts tending to show that they were so used; but, this being done, it is for the court to interpret the contract. Neither is it competent to prove a custom or usage inconsistent with the terms of the contract; and, if the language is explicit, it cannot be varied or contradicted by parol evidence, or a meaning given to the contract different from that called for by its terms. The general rule I take to be, that when the words of any written instrument are free from ambiguity in themselves, and when external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible.

(2) Custom and usage is resorted to only to ascertain and explain the meaning and intention of the parties to a contract when the same could not be ascertained without extrinsic evidence, but never to contravene the express stipulations; and if there is no uncertainty as to the terms of the contract, usage cannot be proved to contradict or qualify its provisions. In matters as to which a contract is silent, custom and usage may be resorted to for the purpose of annexing incidents to it. But the incident sought to be imported into the contract must not be inconsistent with its express terms or any necessary implication from those terms. Usage is sometimes admissible to add to or explain, but never to vary or contradict, either expressly or by implication, the terms of a written instrument, or the fair and legal import of a contract.¹

(3) Where there is uncertainty as to the meaning of an in-

¹ *Barnard v. Kellogg*, 10 Wall. 383; *Walls v. Bailey*, 49 N. Y. 464; *Collender v. Dinsmore*, 55 id. 200.

strument, evidence is admissible of the surrounding facts and circumstances attending its execution; and its uncertain expressions will be construed by the aid so obtained.¹ Thus the meaning and application of a testator's language may be determined from oral evidence showing the circumstances, situation and surroundings of the testator at the time of making his will.²

(4) While collateral facts and circumstances established by parol evidence are admissible to explain ambiguous or doubtful words in an instrument, declarations of parties as to the meaning or application of such words are not admissible.³ Thus, evidence as to the meaning of the term "brass buttons," in trade and commerce, is inadmissible.⁴ It is also admissible to show that a written guaranty of a wood-pulp press, that it would take care of the pulp from four "Scott grinders," was made in reference to the previously represented capacity of the grinders, Scott grinders not being of uniform capacity.⁵

§ 8. **Forms of expression.**— Every legal contract is to be interpreted in accordance with the intention of the parties making it. And usage, when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of the contract, is deemed to form a part of the contract, and to enter into the intention of the parties, when it is so far established and so far known to the parties that it must be supposed that their contract was made in reference to it. Thus in *Smith et al. v. Clews*⁶ it was held that the words "on approval" in a receipt in the following words: "New York, April, 12, 1879. Received from Alfred H. Smith & Co. by their representative, B. W. Plumb, a pair of single stone diamond ear knobs, 10½ carats, of the value of fourteen hundred dollars, 'on approval' to show to my customers, said knobs to be returned to said A. H. Smith & Co.

¹ *Cook v. Baraboo First Nat. Bank*, 83 Wis. 31; 46 Alb. L. J. 387; *McHugh v. Gallagher*, 1 Tex. Cr. App. 196; *Browne & M. Co. v. Sampson*, 44 Ill. App. 308.

² *Barnard v. Barlow*, 50 N. J. Eq. 131; *Re Hobb's Estate*, 37 S. C. 19; *Re Gilmore's Estate*, 154 Pa. St. 523.

³ *Kretschmer v. Hard*, 32 Pac. Rep. 418.

⁴ *Erhardt v. Ullman*, 51 Fed. Rep. 414.

⁵ *Bagley & S. Co. v. Saranac River P. & P. Co.*, 185 N. Y. 626; 48 N. Y. State Rep. 444.

⁶ 114 N. Y. 190; 23 N. Y. State Rep. 166.

on demand. E. Mier," might be shown to have a peculiar and recognized meaning in the diamond trade, and were understood not to confer a power to sell, but authority merely to show diamonds to customers and report to the owner, and that this meaning was well known to plaintiffs and to Plumb and Miers.

VIII. LATENT AMBIGUITIES.

(a) Latent ambiguity is that which is not apparent on the face of the contract, but arises from the application of the words to the objects to which they refer. There may, for example, be two estates or two persons of the same name or description, and the words may equally apply to either. This doubt or difficulty which has been created by parol evidence may be removed by further evidence of like character calculated to explain which of the estates or persons is embraced by the description in the written instrument.¹

(b) If the meaning of a contract by itself is affected with uncertainty, the intention of the parties may be ascertained by extrinsic testimony,² and subsequent conversations between the parties are admissible to explain the intended bearing of an uncertain clause in the contract.³ Thus, resort may be had to parol evidence to show the intention of the parties to a guaranty by showing the situation and surroundings of the parties.⁴

(c) Parol evidence is admissible to show the definition of the word "season," used in a contract of employment,⁵ or to show the meaning of terms used in any particular trade or occupation, when their meaning becomes material to the construction of a contract.⁶

(d) Evidence is admissible to explain the meaning of the term "harbor of New York," as used in a contract of marine insurance.⁷

¹ *Re Ashton* (1892), P. 83; 45 Alb. L. J. 335.

² *Blood v. Fargo & S. Elevator Co.* (S. D.), 45 N. W. Rep. 200; *Farr v. Duxtator*, 29 N. Y. State Rep. 531.

³ *Jenkinson v. Monroe*, 61 Mich. 454; *Bradish v. Yocum*, 180 Ill. 386.

⁴ *Gardner v. Watson*, 76 Tex. 25.

⁵ *Waechtershauser v. Smith*, 31 N. Y. State Rep. 552.

⁶ *Behrman v. Linde*, 15 N. Y. State Rep. 129; *O'Donohue v. Leggett*, 184 N. Y. 40; 29 N. Y. State Rep. 983; *Atlanta v. Schmeltzer*, 83 Ga. 609.

⁷ *Petrie v. Phoenix Ins. Co.*, 182 N. Y. 137; 43 N. Y. State Rep. 478.

(e) A written warranty of a machine to "take care of all the pulp produced by four Scott grinders" may be explained by parol evidence as to what was intended and understood to be the production of such grinders.¹

(f) A variance between the terms "mouse-colored" and "bay" in the pleadings, and "brown" and "light brown" in the mortgage sued on and offered in evidence, is cured by subsequent parol evidence that these descriptive terms are used interchangeably and synonymously among farmers and stock men.²

(g) The term "inch of water," or "square inch of water," has not acquired any fixed technical meaning when used in a grant; and the circumstances surrounding the parties when the grant was made, the size of the apertures through which the water was drawn, the capacity of the wheel, and other facts tending to throw light upon the parties' apparent intention at the time of the grant, are proper matters to be considered.³

§ 9. In construction of will.—In the construction of a will, conversations as to the intention, or even written memoranda, cannot be resorted to for the purpose of sustaining a will which is apparently against the provision of a statute, much less to destroy a will which upon its face is not in contravention of any statute. It is a cardinal principle in the construction of the terms of a will that the intention of the testator must be gathered from the will itself, parol proof being only permissible to show the condition of the estate and the surroundings of the testator. In the case of O'Hara⁴ there was never any question of construction. None was ever raised and none considered; and so the parol evidence received was not admitted or acted upon in the construction of that will.⁵ Where the description of the devisee or thing devised is true in part, but not true in every particular, oral evidence is admissible to show the person or thing intended, provided there be enough on the face of the will to justify

¹ Bagley & S. Co. v. Saranac River Pulp & P. Co., 62 Hun, 618; 41 N. Y. State Rep. 864. 82 Wis. 437; Janesville Cotton Mills v. Ford, 52 N. W. Rep. 764.

² Sparks v. Brown, 46 Mo. App. 529.

⁴ 95 N. Y. 403.

³ Jackson Milling Co. v. Chandos, 36 N. Y. State Rep. 390.

⁵ Matter of Keleman, 126 N. Y. 73;

the application of the evidence.¹ Thus, an error in a Christian or a surname may be proved. Where a devise is to "J. H., second son of T. H.," but in fact J. H. was the third son, evidence of the testator's family, and of other circumstances, may be admitted to show whether he had mistaken the name or description.² As a general rule, all facts relating to the subject of the devise, such as that it was not in the possession of the testator, the mode of acquiring it, the local situation and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will.³ So by "my nephew J. G.," testator's wife's nephew may be shown to be meant, though the testator also had a nephew J. G. Where the ambiguity is patent or apparent on the face of the instrument, oral evidence is not admissible to explain such ambiguity. Thus, where a blank is left for the devisee's name in a will, oral evidence cannot be admitted to show whose name in the will was intended to be inserted.⁴ But where there is a blank for the Christian name only, oral evidence was admitted to prove the individual intended.⁵ Where a will mentioned George, the son of George Gord, and also George, the son of John Gord, a bequest to "George, the son of Gord," was explained by proof of the declarations of the testator to mean George, the son of George Gord.⁶ Where a testator devised "all his farm called Trogues Farm," it was held that it might be shown of what parcels the farm consisted.⁷ Where a lease professed to demise premises and a yard, extrinsic evidence may be admitted to rebut the presumption that a cellar under the yard was also intended to pass.⁸

IX. PATENT AMBIGUITIES.

It is not admissible to explain a patent ambiguity or an ambiguity which appears on the face of an instrument and show that something is omitted which must be added before

¹ *Miller v. Traverse*, 8 Bing. 248.

⁷ *Wills v. Leverich*, 20 Oreg. 168;

² *Barclay v. Pursley*, 110 Pa. St. 13;
Wilbur v. Stoepel, 82 Mich. 344.

Rollins v. Pueblo County Com'rs, 15 Colo. 103.

³ *Wigram on Interp.* Wills, 79.

⁸ *Taylor v. Moore*, 63 Vt. 60; *Still-*

⁴ *Webster v. Atkinson*, 4 N. H. 21.

well v. St. Louis & H. R. Co., 39 Mo.

⁵ *Price v. Page*, 4 Ves. 680.

App. 221; *Tenney v. Abraham*, 43

⁶ *Gord v. Needs*, 2 M. & W. 129.

La. Ann. 240.

the meaning of the parties can be ascertained.¹ Thus where a contract in writing stated "I hereby agree to take 50,000 lbs. of sugar of B., and pay him therefor six per pound," it contains patent ambiguity, and parol evidence is not admissible to show that six cents was the price agreed on; consequently no action could be maintained upon the contract;² and generally when the ambiguity arises from the phraseology of the contract, and not from extrinsic matters, the ambiguity is patent and cannot be cured by parol evidence.³

X. CUSTOM OR USAGE.

§ 10. In general.—When the existence of any custom is in question, every fact is deemed to be relevant which shows how, in particular instances, the custom was understood and acted upon by the parties then interested.⁴ Evidence of usage or custom is not admissible without an allegation in the pleadings or the existence of the custom.⁵ Every legal contract is to be interpreted in accordance with the intention of the parties making it. And usage, when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of the contract, is deemed to form a part of the contract and to enter into the intention of the parties, when it is so far established, and so far known to the parties, that it must be supposed that their contract was made in reference to it.⁶ And evidence is always admissible to explain the meaning which usage has given to words or terms, as used in any particular trade or business, as a means of enabling the court to declare what the language of the contract did actually express to the parties.⁷ Parties are held to contract in reference to the law of the state in which they reside. For all men, being bound to know the law, are presumed, beyond dispute, to contract in reference to it. And so they are presumed to contract in reference to the

¹ *Corker v. Corker*, 87 Cal. 643;
Osgood v. Bander, 82 Iowa, 171.

⁵ *Morowske v. Rohrig*, 53 N. Y. State Rep. 220.

² *Colt v. Cone*, 107 Mass. 285.

⁶ *Walls et al. v. Bailey*, 49 N. Y.

³ *Edwards v. Clark*, 83 Mich. 246.

464.

⁴ *Hotchkiss v. Artisans' Bank*, 42 Barb. 517; *Knowles v. Dow*, 22 N. H. (2 Fost.) 403; *Webber v. Kingsland*, 8 Bosw. 415.

⁷ *Newhall v. Appleton et al.*, 114 N. Y. 140; 22 N. Y. State Rep. 670.

usage of the particular place or trade in or as to which they enter into agreement. When it is so far established, and so far known to the parties, that it must be supposed that their contract was made in reference to it, evidence of usage is received as is any other parol evidence where a writing is under consideration. It is to apply the written contract to the subject-matter, to explain expressions used in a particular sense, by particular persons, as to particular subjects, and to give effect to language in a contract as it was understood by those who made use of it. Custom is that length of usage which has become law. It is a usage which has acquired the force of law, and ignorance of the law will not excuse. A general usage is the common-law itself, or a part of it. Thus the allowance of days of grace on a bill or note is a custom of merchants; but it is established by a usage so general, so long continued, so pervading the whole commercial world, that it is universally understood to enter into every bill or note of a mercantile character, and to form so completely a part of the contract that the bill or note does not become due, in fact or in law, on the day mentioned on its face, but on the last day of grace. All trades have their usages; and when a contract is made with a man about the business of his craft, it is framed on the basis of its usage, which becomes part of it, except when its place is occupied by particular stipulations. This means only this: That the facts and circumstances of the case are such that the usage is of so long continuance, so well established, so notorious, so universal and so reasonable in itself, as that the presumption is violent that the parties contracted with reference to it, and made it a part of their agreement.

§ 11. *Illustrations.*—(a) Customary rights and incidents universally attaching to the subject-matter of the contract in the place and the neighborhood where the contract was made are impliedly annexed to the written language and terms of the contract, unless the custom is particularly and expressly excluded.¹ Parol evidence of custom and usage consequently is always admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established

¹ *Scott v. Hartley*, 126 Ind. 239.

usage.¹ Thus, the custom of the country in regard to the claims of an outgoing tenant of a farm will prevail, although there is a lease under seal regulating the terms of the holding, but not containing stipulations as to the terms of quitting, which can exclude the custom.²

(b) The customary right of a tenant to the away-going crop, to compensate for work, seed and materials employed in manuring, tilling and sowing the land, also the customary right of a heriot on the death of a tenant for life, and all customs and usages respecting the cultivation of the soil and the mode of husbandry, will impliedly prevail, if the lease is silent respecting them; and parol evidence is, consequently, admissible to superadd the usage and customary right to the contract between the parties; such right and usage being recognized by law as incident to the subject-matter of the contract, and consequential upon the taking of the land.

(c) Omissions may be supplied by the introduction of the custom, but the custom cannot prevail over and nullify the express provisions and stipulations of the contract.³

(d) In all contracts as to the subject-matter of which known usages prevail, parties are bound to proceed with the tacit assumption of those usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding. Evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing, partly implied or understood and unwritten. It is for this reason that evidence of a usage or custom existing in a particular trade or business, or in a particular locality, is permitted to be shown.⁴

(e) It is well settled that a general usage, or one which is known to the parties and which does not conflict with the express terms of a contract, forms a part thereof as much as though written therein.⁵ But the evidence must not be of a particular which is repugnant to or inconsistent with the written contract.

¹ De Witt v. Berry, 134 U. S. 306.

² Knapp v. Marlboro, 29 Vt. 282.

³ O'Donohue v. Leggett, 134 N. Y.

40; 29 N. Y. State Rep. 983; Gage v. Meyers, 59 Mich. 300.

⁴ Heald v. Cooper, 8 Me. 83.

⁵ Supperly v. Steward, 50 Barb. 62.

(*f*) Usage is admissible for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but not to vary or contradict, either expressly or by implication, the express terms of the written instrument.¹

(*g*) The purpose of evidence of custom is to ascertain the intention of the parties where it cannot be ascertained by the terms of the contract.² Thus, a general custom of saw-mills to keep the slabs as part compensation for sawing the logs is provable.³ So is parol evidence of trade usage ascertaining the duties of a traveling salesman, where there is a written contract not defining his duties.⁴ So is evidence of the general manner of business of an agent to loan money;⁵ and of a custom to sell for cash.⁶ And so is evidence of the habits of insurance agents in respect to performing the details of the business, and of the employment of clerks and of their duties.⁷

(*h*) A church may show it was not its custom to pay trustees for services;⁸ and a boom company may show that it was their custom to deliver logs of a certain size to different mills than the one named in the contract, when such logs have been forced under the boom.⁹

(*i*) The usual rates charged for premiums on the insurance of other property similar to that described in the policy may be shown.¹⁰ It may be shown that machinery used in a paper-mill is of the ordinary and usual kind.¹¹ The habit of mules for stumbling may be shown.¹²

(*j*) The habits of a person killed, in regard to being sober and industrious, and his character as a workman, are competent to show the value of his services, and the loss to his estate caused by his death.¹³

¹ O'Donohue v. Leggett, 134 N. Y. 40; 29 N. Y. State Rep. 983; De Witt v. Perry, 134 U. S. 306.

² MacClusky v. Klosterman (Oreg.), 25 Pac. Rep. 366.

³ Hewitt v. John Week Lumber Co., 77 Wis. 548.

⁴ Brown v. Baldwin & G. Co., 37 N. Y. State Rep. 363.

⁵ Stein v. Swesen, 46 Minn. 360.

⁶ Tyler v. O'Reilly, 59 Hun, 618; 36 N. Y. State Rep. 106.

⁷ Arff v. State F. Ins. Co., 34 N. Y. State Rep. 366; 125 N. Y. 57.

⁸ Cicotte v. St. Anne's Church, 60 Mich. 552.

⁹ Wausau Boom Co. v. Dunbar, 75 Wis. 133.

¹⁰ Deveraux v. Sun F. Office, 51 Hun, 147; 20 N. Y. State Rep. 584.

¹¹ Sheperd v. Hill (Mass.), 24 N. E. Rep. 1025.

¹² Patterson v. South & N. A. R. Co. (Ala.), 7 S. Rep. 437.

¹³ Van Gent v. Chicago, M. & St. P. R. Co. (Iowa), 45 N. W. Rep. 913.

(k) What was usually and habitually done in the running of trains may be proved to rebut a claim that an employee was negligent in running a train in violation of rules;¹ and the usual custom of railroads in regard to turn-tables;² and as to the mode of shipment of baled cotton.³

(l) Evidence of general custom, or of the amount of care exercised by men in general in similar circumstances, is competent upon the question whether or not a person exercised ordinary care in the custody of bailment.⁴ So evidence of a general custom for people to cross railroad tracks at the point where the assured was killed is competent as tending to show whether he was violating the law or rules of a company in crossing the track.⁵

(m) It is competent to show a custom or habit for switchmen to go between the cars under like circumstances to those under which the plaintiff was injured;⁶ or for brakemen to get on coal-cars over the side.⁷

(n) It is competent to show that other business men, under the same circumstances, acted as the defendant acted.⁸

(o) A contractor may show a general custom among contractors to charge a profit upon the amount paid by them to workmen when the contract is by the day.⁹

(p) Evidence of the usual and ordinary distance for the erection of signals from a low bridge is competent on the question whether a certain signal was too near a bridge to operate as a sufficient warning, in an action by a brakeman for personal injuries from being struck by a low bridge in which the warning signal was but fifty-one feet from the bridge.¹⁰

¹ *Hunn v. Michigan C. R. Co.*, 78 Mich. 513; *Daley v. American Printing Co.*, 152 Mass. 581. *Ass'n*, 129 N. Y. 623; 36 N. Y. State Rep. 928.

² *Bridger v. Ashville & S. R. Co.*, 27 S. C. 456; 13 Am. State Rep. 653. ⁶ *Hissory v. Richmond & D. R. Co.*, 91 Ala. 514.

³ *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653; *McKay v. New York Central & Hudson River R. Co.*, 50 Hun, 563; 20 N. Y. State Rep. 816. ⁷ *Coats v. Boston & M. R. Co.*, 153 Mass. 297.

⁸ *Rand v. Johns* (Tex. App.), 15 S. W. Rep. 200; *Holland v. Tenn. Coal & J. R. Co.*, 91 Ala. 444.

⁹ *McDonnell v. Ford*, 87 Mich. 198.

¹⁰ *Wallace v. Central Vermont Co.*, 138 N. Y. 302; 52 N. Y. State Rep. 351; *Flanders v. Chicago, St. P.*,

⁵ *Duncan v. Preferred Mutual Acc.*

(*q*) The rules of a railroad company as to the management of a switch, and of the usual manner of running trains upon a certain track, are admissible.¹

(*r*) No proof of custom can be made to the contrary of the stipulations of a contract, nor to contravene the legal construction implied from a written contract, silent as to the time of performance, that the work is to be done and materials furnished in a reasonable time.²

(*s*) Custom or usage may be proved, not only to explain the meaning of terms having a peculiar and technical meaning, but also to supply evidence of the intention of the parties to a contract.³ Thus proof of a custom is admissible to show the method intended by the parties to a contract for the sale of logs to be followed in measuring the logs, where the contract does not express the mode, and to show the amount allowed on logs sold according to "board measure" for hollow or pickey logs.⁴

§ 12. **Qualities of usage.**—In order to amount to a binding usage of a trade or business, it must be shown to be so well established, so general, so uniform and notorious, that it may reasonably be presumed that the parties knew and contracted in reference to it.⁵ It must be shown that it is established and not merely casual, uniform and not varying; general and not personal; or that it was known to the parties when the contract was entered into.⁶ It is sufficient if it be shown to be so well known and acquiesced in that it may reasonably be presumed to have been an ingredient imported into the contract by the parties;⁷ and this is the case only when the usage is certain, reasonable and universally acquiesced in, so that every one engaged in the trade knows, or might have known, of it, if he had taken the trouble to inquire. A written ex-

M. & O. R. R. Co. (Minn.), 53 N. W. Rep. 544.

¹ Chicago, M. & St. P. R. Co. v. O'Sullivan, 143 Ill. 48.

² Morowske v. Rohrig, 53 N. Y. State Rep. 220; Richmond & D. R. Co. v. Hissong (Ala.), 13 S. Rep. 209; Sham v. Jacobs (Iowa), 55 N. W. Rep. 333.

³ Destrehan v. Louisiana Cypress Lumber Co., 45 La. Ann. 87.

⁴ Id.; Adamant Plaster Co. v. National Bank, 5 Wash. 232.

⁵ Foye v. Leighton, 22 N. H. 71; Smith v. Floyd, 18 Barb. 392.

⁶ Duquid v. Edwards, 50 Barb. 288; Hursh v. North, 40 Pa. St. 241; Gallup v. Lederer, 1 Hun. 282.

⁷ Smith v. Gibbs, 44 N. H. 335; Lewis v. Thatcher, 15 Mass. 433.

press contract cannot be controlled or varied or contradicted by a usage or custom.¹ Where it is sought to establish a usage of trade to control the meaning of words, it must be shown that the words are used in that trade and are understood in a defined sense. And the proof must show facts that lead to a conviction that they were used in that case in such sense. It must be proved by the multiplication or aggregation of a great number of particular instances; and these instances must have a principle of unity running through them, and that unity must show a certain course of business, and an established understanding respecting it. The testimony of one witness is not generally sufficient to establish a usage of trade;² but the question as to whether the evidence of one witness is sufficient or not must be determined from the witness' means of information.³ To establish a shipping usage on a certain river, the witness may state his habit and custom in shipping in all boats on the river.⁴ An isolated instance is not sufficient to prove a custom; nor will evidence of the custom of one person be sufficient to establish a general course of trade.⁵

§ 13. When not necessarily general.—It is not necessary that usage should be general—that is, extend over the whole country; neither is its antiquity of any importance except to show that the parties knew of it and intended to adopt it as the law of their contract.⁶ The usage must be shown to be certain and reasonable, and so universally acquiesced in that everybody in the particular trade knows it, or might know it if he took the pains to inquire.⁷ If the usage exists, and it is not inconsistent with the written contract, it is precisely the same as if it were written in words attached to the contract; and it cannot be got rid of by proof of an oral agreement to waive or vary it.⁸

§ 14. How established.—It is not sufficient to show by a witness belonging to a particular trade that he does a certain

¹ *De Witt v. Berry*, 134 U. S. 306;
O'Donohue v. Leggett, 134 N. Y. 40;
29 N. Y. State Rep. 983; *Conrod v.*
Fisher, 37 Mo. App. 352; *Gage v.*
Meyers, 59 Mich. 300; *Scott v. Hart-*
ley, 126 Ind. 239.

² *Wood v. Hicock*, 2 Wend. 501.

³ *Haskins v. Warren*, 115 Mass. 514;
Vail v. Rice, 5 N. Y. 155.

⁴ *Berry v. Cooper*, 28 Ga. 543.

⁵ *Burr v. Sickles*, 17 Ark. 428.

⁶ *Wood v. Hicock*, 2 Wend. 501;
Bank of Utica v. Smith, 18 Johns.
230.

⁷ *Foxhall v. International Land*
Credit Co., 16 L. T. (N. S.) 637.

⁸ *Fawkes v. Lamb*, 31 L. J. Q. B. 98.

thing in a particular way, but it must be shown that that is the usual mode adopted in the trade.¹ The course adopted by the trade must be shown,² and evidence of an isolated instance is not sufficient.³ It is not necessary that the witness should be engaged in a particular trade or business to make him competent to testify to a usage pertaining to it. It is sufficient if he has acquired his knowledge by dealing with those engaged in it. The witness must state what is done, and how.⁴ In all cases, in order to establish a customary right, the evidence should not be less than that required to establish a prescriptive right.⁵ In order to establish a usage of a certain trade or business the testimony should come from those engaged in the business or those who are familiar with the existence and application of the usage.⁶ A usage must be proved by evidence of facts and instances in which it has been acted upon.⁷ It is not necessary that there should be either the antiquity, uniformity or notoriety that is essential to establish a custom; it is sufficient if it is shown to be so well known and so generally acquiesced in that it may reasonably be presumed to have been imported into their contract by the parties. The mere fact that the evidence is conflicting does not settle the question, but it is for the jury to say from all the evidence whether or not the usage is established.⁸

XI. LOCAL USAGE — NOTICE OF MUST BE SHOWN.

It would seem that, upon principle, for a party to be bound by a local usage, or a usage of a particular trade or profession, he must be shown to have knowledge or notice of its existence. For upon what basis is it that a contract is held to be entered into with reference to or in conformity with an existing usage? Usage is engrafted upon a contract, or invoked to

¹ *Geary v. Meagher*, 33 Ala. 630;
Pfiel v. Kemper, 3 Wis. 315.

² *Austin v. Williams*, 2 Ohio, 64.

³ *Burr v. Sickel*, 17 Ark. 428.

⁴ *Griffin v. Rice*, 1 Hilt. 184; *Commercial Bank of Pennsylvania v. Union Bank*, 19 Barb. 392; *Cheapside Bank v. Swain*, 29 Md. 483.

⁵ *Smith v. Floyd*, 18 Barb. 523.

⁶ *Smith v. Wright*, 56 Ala. 417.

⁷ *Mills v. Hallock*, 2 Edw. Ch. 652;
Chenery v. Goodrich, 106 Mass. 566.

⁸ *Upton v. Starbridge Cotton Mills*, 111 Mass. 446.

give it a meaning, on the assumption that the parties contracted in reference to it; that is to say, that it was their intention that it should be a part of their contract, whenever their contract in that regard was silent or obscure. But could intention run in that way unless there was knowledge of the way to guide it? No usage is admissible to influence the construction of a contract, unless it appears that it be so well settled, so uniformly acted upon and so long continued as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference thereto. There must be some proof that the contract had reference to it, or proof arising out of the position of the parties, their knowledge of the course of business, their knowledge of the usage, or other circumstances from which it may be inferred or presumed that they had reference to it. Frequent are the expressions in the later authorities that, where the usage is of a particular trade or locality, it must appear that it was known to a party before he is bound by it, so as to make it a part of his contract.¹ In *Higgins v. Moore*² it is said: "The usage being local, its existence must be clearly proved to have been known to the plaintiff at the time." In *Esterly v. Cole*³ it is said that, where there is a general usage in any particular trade or branch of business to charge or allow interest, parties having knowledge of the usage are presumed to contract in reference to it. And again, in the same case, that if proof of the existence of the usage had been followed with proof that defendant had knowledge thereof, the case would have been made out. In *Dawson v. Kittle*⁴ it is said that the usage must be known to the party at the time of contracting, or he must be presumed to have known or assented to it. In *Wheeler v. Newbould*⁵ it is expressly held that proof of a local usage can never be received to vary the construction which the law would otherwise give to a contract, unless it is clearly proven that its existence was known to the parties, and that their contract was made in reference to its terms. In *Kirchner v. Venus*⁶ it was held that evidence of the usage of a particular place is admitted only on the

¹ *Bradley v. Wheeler*, 44 N. Y. 500.

⁴ 4 Hill, 107.

² 34 N. Y. 425.

⁵ 5 Duer, 29.

³ 3 N. Y. 502.

⁶ 12 Moore, Priv. Coun. Cases, 361.

ground that the parties who contracted are both cognizant of the usage, and must be presumed to have made their agreement in reference to it. In *Caldwell v. Dawson*¹ it is held that it must appear that the party had actual knowledge of the usage, or the evidence must be such as to clearly authorize the presumption that he had knowledge of it. And further, that the fact that one party had knowledge of the usage, and supposed that it would enter into the contract, is not sufficient. In *Barnard v. Kellogg*² it is said that usage is used as a mode of interpretation, on the theory that the parties knew of its existence and contracted with reference to it; and that the contract of the parties in that case showed clearly that they did not know of the custom, and could not, therefore, have dealt with reference to it. Not only the existence of such usage, but whether knowledge of it exists in any particular case, is a question of fact for the jury. Of course, then it is to be established or negatived in all its essentials, as well as to knowledge as to any other, by the same character and weight of evidence as are necessary to maintain other allegations of fact. It may be established by presumptive as well as by direct evidence. Nor, on the other hand, is it exempt from the difficulty that a presumption may not prevail against direct evidence to the contrary of it. The jury may presume, from all the circumstances of the case, that knowledge or notice existed. We have seen that there are usages which have become so general and so universally received and acted upon as that they have become a part of the common law, and no one can be heard to profess ignorance of them. But it is equally true that there are usages so restricted as to locality, or trade, or business, as that ignorance of them is a valid reason why a party may not be held to have contracted in reference to them. In *Walls et al. v. Bailey*³ it is held that parties are presumed to contract in reference to a uniform, continuous and well-settled usage pertaining to the matters as to which they enter into agreement, where such usage is not in opposition to well-settled principles of law and is not unreasonable. But where the usage is of a particular trade or locality, such presumption is not conclusive, and may be rebutted by proof

¹ 4 Metc. 121.

³ 49 N. Y. 464.

² 10 Wall. 383.

upon the part of one of the contracting parties that he was ignorant of such usage.

In short, the general rule is that a mere local usage is not binding upon a party, unless he has notice or knowledge of its existence at the time when the contract was entered into, and the burden of establishing knowledge is on the party setting it up.¹ The usage or custom of a particular port, in a particular trade, is not such a usage or custom as will limit, control or qualify the language of a contract.² In New York local usage is not admissible to control the rules of law respecting a particular trade.³ But a shipper of goods is chargeable with notice of an established and well-known usage existing in a particular trade.

XII. WHEN CUSTOM NOT VALID.

In order to be valid and binding it is necessary that a usage should be reasonable. Thus the following usages have been held bad as against the policy of the law: For the master of a vessel to sell the cargo of a stranded vessel without necessity;⁴ authorizing a person to charge for services not rendered, or material never furnished;⁵ exempting carriers from liability for negligence, or favoring the violation of a statute;⁶ or for a bank not to correct mistakes in counting money, unless it is discovered before the party leaves the bank.

XIII. MEANING OF WORDS INTERPRETED BY USAGE.

In a particular trade or business, words having a well understood meaning in ordinary transactions have often a technical sense, entirely different from their ordinary signification; so that if in that class of contracts the words were to be given their ordinary interpretation, the intention of the parties would be wholly subverted. In such cases evidence of usage is admissible to explain the local, technical or peculiar meaning in the trade or business to which the contract relates, pro-

¹ *Albatross v. Wayne*, 16 Ohio, 513; ³ *Higgins v. Moore*, 34 N. Y. 417; *Flynn v. Murphy*, 2 E. D. Smith (N. Y.), 378; *Barnard v. Kellogg*, 10 Wall. 383. *Bissell v. Campbell*, 54 id. 353.

² *Adams v. Insurance Co.*, 76 Pa. St. 411; *Cope v. Dodd*, 13 id. 33.

⁴ *Stillman v. Hurd*, 10 Tex. 107.

⁵ *Kendall v. Russell*, 5 Dana (Ky.),

⁶ *Dunham v. Dey*, 13 Johns. 44.

vided sufficient is proved to raise a presumption that the parties intended to use the words in their technical or particular sense. In such cases it is proper to ask a witness whether there is any generally understood meaning of certain words among persons engaged in the particular trade or business under consideration;¹ and such a question must be answered by a witness before he is asked what he understood by the written contract to which it is meant to apply the usage. Thus usage has been admitted to show what was meant by the words "ream,"² "all faults,"³ "fur,"⁴ "roots,"⁵ or "building." So also to show what is meant by the words "weeks," "months," etc., in a certain class of contracts.⁶ So, too, where certain work, as "plastering a house," or "laying a walk," etc., is to be done at so much per square yard, evidence of the usage of plasterers, in the locality where the contract was made, is admissible to determine whether, in ascertaining the quantity, the whole sides of the house should be measured as solid, or whether allowance should be made for openings of doors and windows.⁷ And in the same manner the meaning of certain phrases is ascertained; thus, "coppered-ship," "a clear bill of lading,"⁸ "store fixtures," "immediate delivery,"⁹ "sea-litter,"¹⁰ "a full and complete cargo of sugar." Parol evidence was admitted to show that in a contract for a certain number of "barrels" of petroleum at so much a gallon, the word "barrel" means a vessel of a certain capacity, and not the statutory measure of quantity. And that for this purpose evidence that petroleum oil is often sold in barrels, and that barrels are usually of such certain capacity, is competent.¹¹

XIV. ADDING INCIDENT TO CONTRACT.

Usage is admissible to add incidents to the contract,—that is, to show what things are customarily treated as incidental and accessory to the principal thing which is the subject of

¹ *Robertson v. Jackson*, 2 C. B. 412.

² *Ganson v. Madigan*, 15 Wis. 144.

³ *Corter v. Coal Co.*, 77 Pa. St. 286.

⁴ *Astor v. Union Insurance Co.*, 7 Cow. 202.

⁵ *Coit v. Commercial Ins. Co.*, 7 Johns. 385.

⁶ *Hinton v. Locke*, 5 Hill, 437.

⁷ *Walls v. Bailey*, 49 N. Y. 467.

⁸ *Creery v. Holly*, 14 Wend. 26.

⁹ *Nelson v. Smith*, 36 N. J. L. 148.

¹⁰ *Sleight v. Hartshorne*, 2 Johns.

561.

¹¹ *Schiller v. Stevens*, 100 Mass. 518.

the contract, or to which it relates,— which are not inconsistent therewith.¹ This is upon the ground that the parties did not mean to express the whole contract in writing, but made it in reference to usage, which becomes a part of it.² Thus a note is made payable thirty days from date, but usage steps in and postpones the payment for three days. So, too, it may be shown by parol that it is the custom of persons employed in particular trades, under a general contract of hiring, to have certain holidays in the year to themselves. *Prima facie*, every contract is to be understood as containing, in some sort, an implied reference to the general law; but the general rule is clear, that no extrinsic evidence of usage can be received to vary, add to or contradict the plain sense of the contract, when once properly ascertained.³ The application of the rule depends so much upon peculiar forms of expression, and terms in the contract, which may strike different minds in different ways, that judges disagree on this point; for the presumption that parties contracted in reference to the general law must be overcome before the usage can be applied.

¹ Cooper v. Kane, 19 Wend. 386; ² United States v. Arredondo, 6 Pet.
Dixon v. Dunham, 13 Ill. 324; Leach 715; Palmer v. Kane, 5 Wis. 265.
v. Beardslee, 22 Conn. 404. ³ Parsons v. Miller, 15 Wend. 562.

CHAPTER X.

EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

PAROL EVIDENCE CONCERNING WRITINGS.

- § 1. Writings not signed by both parties.
2. As to the existence, identity or validity of contract.
3. To show that writing purporting to be a contract was not intended as such.
4. Surrounding circumstances.
5. When consideration of written contract may be shown to be different.
6. Receipt, etc.
7. Parol evidence to complete an entire agreement of which a writing is only a part.
8. Illustrations.
9. As to bills and notes.
10. To show that writing apparently absolute is not.
11. Statutes of fraud — Admissibility of parol evidence.
12. Bills of lading.

§ 13. Subsequent changes of contract.

14. Bills of sale — Parol evidence to vary.
15. Written assignments — Parol evidence as to.
16. True part and character of party.
17. Written leases — Parol evidence as to.
18. Collateral contract by parol.
19. Illustrations.
20. To show a deed to be a mortgage.
21. Conditions upon which a writing was delivered.
22. Illustrations.
23. Immovables, inscription, etc.
24. Warranty.
25. Judicial records.
26. Mistake.
27. Fraud — Parol evidence of.
28. When written instrument may be contradicted.

PAROL EVIDENCE CONCERNING WRITINGS.

§ 1. Writings not signed by both parties.— A writing signed by one party to a contract does not preclude him from showing by parol what the undertaking of the party not signing was.¹ Thus a bill of sale of goods signed by the vendee alone, stating the number of packages and terms of sale, is not the contract of both parties, but only of the vendee; and parol evidence is admissible in an action for the purchase-price to show that the sale was by sample, and that the seller warranted the goods to be like the sample, and that some of the

¹ *Tocci v. Arata*, 35 N. Y. State Rep. 42; *Dana v. Taylor*, 150 Mass. 25.

goods did not comply with the warranty.¹ Evidence of a parol agreement by a landlord to make certain changes in the premises, and to accept a less amount of rent while the changes were in progress, is admissible though the agreement is made contemporaneous with a written lease.² It seems that evidence is admissible of a parol agreement guarantying the quantity of land embraced by a written contract of a sale or a deed of conveyance, unless the written agreement embraces the whole contract;³ and to prove an agreement in which a written instrument originated and of which it constituted a part;⁴ and to establish a contemporaneous oral agreement which induced the execution of a written contract, though it may vary, change or reform the instrument.⁵ But where a written offer, containing expressly or by implication all the engagements appropriate and necessary to the agreement, is signed by one party and accepted by the other, it constitutes such a complete contract between them that oral evidence is inadmissible to add to its terms; the general rule being that, if a paper appear on its face to be a complete contract, then, in the absence of fraud, accident or mistake, parol evidence is inadmissible to enlarge its terms,—the conclusive presumption of law being that such paper embodies the entire agreement of the parties. And whether or not a writing appears upon its face to be the complete expression of the agreement of the parties is for determination by the court.⁶

§ 2. As to the existence, identity or validity of contract. Conversations and negotiations preliminary to a written agreement, although merged in it, are admissible in evidence, not for the purpose of explaining its terms, but to throw light upon the question of its execution,⁷ and to show that a writing

¹ *Curtis v. Soltan*, 34 N. Y. State Rep. 767; *Routledge v. Worthington Co.*, 119 N. Y. 592; 30 N. Y. State Rep. 195; *Smith v. Coleman*, 77 Wis. 343; *Hess v. Board of Education*, 33 Ill. App. 440; *Work v. Beach*, 53 Hun, 7; 37 N. Y. State Rep. 547; *Ferguson v. Baker*, 26 N. Y. State Rep. 626; 116 N. Y. 257.

² *Sire v. Rumbold*, 39 N. Y. State Rep. 35; *Clenigan v. McFarland*, 34 id. 624; *Roberts v. Bonaparte*, 73 Md.

191; *Condit v. Coudrey*, 123 N. Y. 463; 34 N. Y. State Rep. 107.

³ *McGree v. Craven*, 106 N. C. 351.

⁴ *McAteer v. McAteer*, 31 S. C. 313.

⁵ *Ferguson v. Rafferty*, 128 Pa. St. 337.

⁶ *Harrison v. McCormick*, 89 Cal. 327; 23 Am. St. Rep. 469; *The Lamson Con. S. S. Co. v. Harting*, 46 N. Y. State Rep. 191.

⁷ *Wilbur v. Stoepe*, 82 Mich. 344.

never took effect as a contract;¹ or that the person whose name is subscribed to a contract never intended to sign it, but supposed he was signing one previously drawn;² and evidence of a contemporaneous oral agreement is admissible on the question of usury in a loan, although a writing signed by the borrower on the same subject is proved.³

§ 3. **To show that a writing purporting to be a contract was not intended as such.**—Parol evidence may be given to show that a writing purporting to be a contract was not in fact intended by the parties as such. Such evidence is not received to change the written contract by parol, but to establish that such contract had no force, efficacy or effect. This is in avoidance of the instrument and not to change it, and is as competent as it would be to show that a written instrument was obtained fraudulently, by duress, or in an improper manner. Such evidence does not come within the ordinary rule of introducing parol evidence to contradict written testimony, but tends to explain the circumstances under which an instrument was executed and delivered, or to show that it was canceled or surrendered.⁴ So where one of the parties to an action introduces in evidence an order from a third person to the other party to the action for certain property, and a bill from such party to such third person of the property, sent after the property had been delivered, to show a sale, the party against whom the evidence is introduced may show by his own testimony or that of his agent that the bill was sent merely as a memorandum of the value of the lumber, and to notify the person for what amount they would be required to account. It is competent to show the purpose for which the bill was sent, to explain its real meaning and significance. Even if the bill was made out concurrently with the contract, and was part of the *res gestæ*, it is not a writing having such a complete and decisive character as would render parol evidence inadmissible.⁵

§ 4. **Surrounding circumstances.**—The rule that parol evidence is admissible to explain and apply a writing, where

¹Barrett v. Davis, 104 Mo. 549;
McGeragle v. Broemel, 53 N. J. L. 52.

²Cummings v. Ross, 90 Cal. 68.

³Stein v. Swensen, 46 Minn. 360.

⁴Grierson v. Mason, 60 N. Y. 394.

⁵Crosby v. The D. & H. C. Co., 128
N. Y. 641; 40 N. Y. State Rep. 85.

it does not contradict or vary it, is universal in its application, under the rule that a writing may be read in the light of surrounding circumstances, in order that the true intent and meaning of the parties may be arrived at.¹ The rule that contemporaneous parol evidence is inadmissible to contradict or vary the terms of a valid written instrument is limited in its application to the language of the instrument, and does not exclude the light of extrinsic circumstances.² The law does not deny to the reader the same light and information that the writer enjoyed; he may acquaint himself with the persons and circumstances that are the subjects of the allusions and statements in the written agreement, and is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described. The judgment of the court must be simply declaratory of what is in the instrument; it has to ascertain, not what the party intended, but what is the meaning of the words he has used. Thus, to explain a patent ambiguity, parol evidence is never admissible, whatever doubt may exist as to the intention of the parties.

For the purpose of the construction of the instrument, no words can be added or taken from its provisions; but where the words used, in their application to an instrument of which they are a part, are not entirely intelligible, parol evidence of the circumstances attending its execution may, as between the parties, be admissible to aid in the interpretation in its application of the language so used.³ Thus, in such a case, resort may be had to the nature of the business in which the instrument was to be used, the situation and relation of all the parties, and their previous dealings and negotiations which led to the giving of the instrument, to enable the court to understand the meaning of the language used. So recitals in a contract are not strictly any part of the contract, but they may

¹ *Emery v. Webster*, 42 Me. 204; *Pierson v. Atlantic Bank*, 77 N. Y. 304.

² *Rollins v. Pueblo County Com'rs*, 15 Colo. 103; *Sears v. Kings County Elev. R. Co.*, 152 Mass. 151.

³ *Field v. Momson*, 47 N. Y. 221; *Fish v. Hubbard*, 21 Wend. 651; *Merchants' Nat. Bank of Whitehall v. Hall*, 83 N. Y. 346.

have a material influence in construing the instrument and determining the intent of the parties.¹ Too much regard is not to be had to the proper and exact signification of words and sentences so as to prevent the simple intention of the parties from taking effect. And whenever the language used is susceptible of more than one interpretation, the courts will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, and the subject-matter of the instrument. To that extent, at least, the well-settled rule is, that extraneous evidence is admissible to aid in the construction of written contracts. The principle of the admission of this class of evidence is, that the court may be placed, in regard to the surrounding circumstances, as nearly as possible in the situation of the party whose written language is to be interpreted; the question being, what did the persons thus circumstanced mean by the language they have employed? Within this principle all prior conversation between the parties is not excluded. Such conversation may pertain to and explain the surrounding circumstances; may be part of some *res gestæ*; or may point out the subject-matter of the contract, and then it may be admissible in evidence. But this principle does not authorize parol evidence of the language of the parties contradicting, varying or adding to that which is contained in the written instrument; or parol evidence of prior or contemporaneous declarations showing a different intention from that expressed in the instrument. If, after resort to all the evidence admissible within this principle, the court cannot, from the language used, ascertain the meaning and intention of the party to an instrument, then it is a case of incurable or hopeless uncertainty, and the instrument must be held inoperative and void.² The subsequent conduct and acts of the parties are material and competent to show the interpretation which they put on an agreement, and what conditions they have waived.³ Thus, parol evidence is admissible to explain the circumstances under which a letter

¹ Burr et al. v. Amer. S. S. B. Co., 81 N. Y. 178. Emery v. Webster, 42 Me. 204; Dick Bros.' Quincy Brewing Co. v. Fin-

² White's Bank v. Myles, 73 N. Y. 335. nell, 39 Mo. App. 276; Case Mfg. Co. v. Saxman, 138 U. S. 431.

³ Acker v. Bender, 33 Ala. 230;

was written;¹ and when the letters were received;² and to show that a writing sued on does not set out all of the contract relations between the parties;³ and that a grant was expressly subject to a survey to be afterwards made.⁴ But the court cannot give effect to any intention which is not expressed by the language of the instrument when looked at in the light of facts that are properly before the court.⁵ Opinions and intentions of the parties and the surrounding facts are inadmissible to alter the signification of the plain language of a written instrument which is free from ambiguity.⁶

§ 5. When consideration of written contract may be shown to be different.—The consideration of an instrument can be inquired into in a court of law when fraud, mistake or forgery in its execution is the issue.⁷ The consideration recited in a sealed instrument is *prima facie* evidence only, and may be controlled or rebutted by parol proof;⁸ not to contradict the instrument sued on, but to show the consideration upon which it rests.⁹ Thus, oral evidence is admissible to show the consideration of a contract which does not specifically set forth the consideration,¹⁰ or to show that the consideration was paid by another person;¹¹ or that no part of the consideration of a note inured to the benefit of the defendant;¹² or that a part of the consideration was a promise to pay debts due from the promisee to third persons.¹³ Where there

¹ *Oliver v. Hunting*, L. R. 44 Ch. D. 205.

² *Barney v. Forbes*, 118 N. Y. 580; 29 N. Y. State Rep. 980.

³ *Peabody v. Bement* (Mich.), 44 N. W. Rep. 416.

⁴ *Palmer v. Farrell*, 129 Pa. St. 162.

⁵ *Farmers', etc. Co. v. Commercial Bank*, 15 Wis. 424.

⁶ *Humphries v. New York*, L. E. & W. R. Co., 121 N. Y. 436; 31 N. Y. State Rep. 299.

⁷ *Waln v. Waln*, 53 N. J. L. 429.

⁸ *Barbee v. Barbee*, 108 N. C. 581; *Calcote v. Elkins* (Tenn.), 15 S. W. Rep. 85; *Pray v. Rhodes*, 42 Minn. 93; *Nichols v. Nichols*, 133 Pa. St. 438; *Mills v. Allen*, 133 U. S. 423; *Silvers v. Potter* (N. J. Ch.), 48 N. J.

Eq. 539; *Smith v. Arthur*, 110 N. C. 400; *Piedmont Land Co. v. Piedmont F. & N. Co.* (Ala.), 11 S. Rep. 332; *Buford v. Shannon*, 10 id. 263; *Carty v. Connolly*, 91 Cal. 15; *Brown v. Brown*, 106 Mo. 611.

⁹ *Macombe v. Wilkinson*, 83 Mich. 486; *Serat v. Smith*, 15 N. Y. Supp. 330; *Halpin v. Stone*, 78 Wis. 183; *Waller v. Haggerty* (Neb.), 46 N. W. Rep. 221.

¹⁰ *Fitzpatrick v. Moore*, 53 Ark. 4.

¹¹ *Lanier v. Faust*, 81 Tex. 186.

¹² *Marchaud v. Griffin*, 140 U. S. 516; *Merchants' & F. Nat. Bank v. McElwee*, 104 N. C. 315.

¹³ *Price v. Reed*, 38 Mo. App. 489; *Mills v. Allen*, 133 U. S. 423.

is either a direct and positive promise in a written contract to pay the consideration named, or the assumption of an incumbrance on the part of the grantee, parol proof is inadmissible to vary the consideration.¹ Thus, another and further consideration cannot be proved for a written release which recites a consideration of \$1,000;² nor to show that the amount agreed to be paid for a one-third interest in a hotel within a given time was to be paid out of the profits or in any other way not specified in the contract.³ As a general rule, the consideration for a written agreement may be shown by parol, and the recited consideration may be contradicted or shown to be something different.⁴ Thus, the statement of the consideration in a deed, as being a lump sum, may be controlled by parol evidence that the price of the land was to depend upon the number of square feet in its area.⁵ So it may be shown that an instrument was made upon sufficient consideration though no consideration is expressed in it.⁶ And the conversation at the execution of an instrument is admissible to show the real transaction as well as the good faith thereof.⁷ But a new term cannot be introduced in an agreement by such parol evidence,⁸ as that a portion of the rent reserved in money by a lease was to be taken out in boarding.⁹ But parol evidence is admissible to show that a mortgage conditioned for the payment of "any and all notes, checks and drafts indorsed" by the mortgagee was intended to secure and did secure future indorsements, as against a second mortgagee of whose mortgage the former had no notice at the time of making indorsements subsequent to the mortgages for which the mortgage is sought to be foreclosed.¹⁰

¹ Pickett v. Green, 120 Ind. 584.

² White v. Richmond & D. R. Co., 110 N. C. 456.

³ Smith v. Kemp, 92 Mich. 357.

⁴ Ferris v. Hard, 135 N. Y. 354; 48 N. Y. State Rep. 518; Guidery v. Green, 95 Cal. 630; Hill v. Whidden, 158 Mass. 267.

⁵ Cardinal v. Hadley, 158 Mass. 352.

⁶ Seventh Day B. M. F. v. Saunders, 84 Wis. 211.

⁷ Korneman v. Fred Hower Brew.

Co., 53 N. Y. State Rep. 450; Knapp v. Gregory, 65 Hun, 621; 47 N. Y. State Rep. 408; McNulty v. Urban, 50 N. Y. State Rep. 565.

⁸ Gerard v. Cowperthwait, 50 N. Y. State Rep. 592.

⁹ Stull v. Thompson, 154 Pa. St. 43; Hart v. Taylor, 70 Miss. 317; Fuller v. Artman, 69 Hun, 546; 53 N. Y. State Rep. 339.

¹⁰ Farr v. Nicholas, 132 N. Y. 327; 44 N. Y. State Rep. 555.

§ 6. **Receipts, etc.**—While a written receipt may be explained or contradicted by parol testimony, a contract embraced therein cannot be.¹ Thus, parol evidence is admissible to show that the sum mentioned in a paper reciting the receipt from a person named, as a loan, of a specified sum, to be returned on a certain day, was not received by the person who signed such receipt, but was in fact loaned to another. So parol evidence is admissible to show that a note of a third person was not taken in absolute payment of a debt, although receipted bills for the debt were delivered to such person.² Any proofs sufficient to enable a releasor to maintain an action for the reformation of the release so as to except from its provisions the demand in suit are available to him in an action, by way of evidence of its terms; and upon such issue evidence of the preliminary negotiations of the parties, and of the releasor's ignorance, is relevant and important.³ A receipt is not conclusive evidence of payment,⁴ and it is admissible to show that by a previous agreement a receipt was to have no effect;⁵ and a receipt in full will not exclude parol evidence that it was merely to discharge one of two obligations.⁶ But a settlement, evidenced by written receipts, showing on their face a full settlement of all dealings between the parties, is conclusive in the absence of fraud or mistake, and cannot be changed by parol evidence of a contemporaneous agreement that it did not include certain dealings.⁷ A written release of a claim does not cut off proof of an oral promise to make compensation therefor in a will.⁸ A writing may be both a receipt and a contract, in which case the portion operative as a receipt may be contradicted or explained like any other receipt.⁹

¹ *Prairie School Tp. v. Haselen*, 55 N. W. Rep. 938; *Morse v. Rice*, 36 Neb. 122.

² *Thorman v. Polya*, 48 N. Y. State Rep. 671; *Farcira v. Smith*, 52 id. 124.

³ *Kirchner v. New Home Sewing Machine Co.*, 48 N. Y. State Rep. 242; 135 N. Y. 182.

⁴ *Rader v. McElvan*, 21 Oreg. 56; *Hellwig v. Benzinger* (Md.), 22 Atl. Rep. 265.

⁵ *Conselman v. Collins*, 35 Ill. App. 68.

⁶ *Shenandoah Cotton Co. v. Lefterts*, 59 Hun, 620; 36 N. Y. State Rep. 63.

⁷ *Pratt v. Castle*, 91 Mich. 484.

⁸ *Andrews v. Brewster*, 124 N. Y. 433; 36 N. Y. State Rep. 412.

⁹ *Hossack v. Moody*, 39 Ill. App. 17.

§ 7. **Parol evidence to complete an entire agreement of which a writing is only a part.**—To bring a case within the rule admitting parol evidence to complete an entire agreement of which a writing is only a part, two things are essential. First, the writing must appear on inspection to be an incomplete contract; and second, the parol evidence must be consistent with and not contradictory of the written instrument.¹ It is a general rule that evidence of what was said between the parties to a valid instrument in writing, either prior to or at the time of its execution, cannot be received to contradict or vary its terms. In other words, the general rule requires the rejection of parol evidence when its effect would be to cut down or destroy stipulations and undertakings entered into between parties and by them put in writing. All prior and contemporaneous negotiations and oral promises in reference to the same subject are merged in the written contract, and the rights and duties of the parties are to be determined by that instrument. When that has been executed, it is then conclusively presumed that it contains the whole engagement of the parties. This rule is not universal in its application, because the courts, in their effort to prevent fraud and injustice, have laid down certain exceptions, which, though correct in principle, are sometimes so loosely applied in practice as to threaten the integrity of the rule itself.² The real exceptions may be grouped in two classes, the first of which includes those cases in which parol evidence has been received to show that that which purports to be a written contract is in fact no contract at all. Thus, fraud, illegality, want of consideration, delivery upon an unperformed condition, and the like, may be shown by parol, not to contradict or vary but to destroy a written instrument. Such proof does not recognize the contract as ever existing as a valid agreement, and is received from the necessity of the case to show that that which appears to be is not, and never was, a contract.³

The second class embraces those cases which recognize the written instrument as existing and valid, but regard it as incomplete, either obviously or at least possibly, and permit parol

¹ Case v. Phoenix Bridge Co., 134 N. Y. 78; 45 N. Y. State Rep. 603.

² Benton v. Martin, 52 N. Y. 570; 1 Greenl. Ev., § 284.

³ 1 Greenl. Ev., § 284a.

evidence, not to contradict or vary, but to complete the entire agreement of which the writing is only a part. Receipts, bills of parcels and writings that evidently express only some parts of the agreement are examples of this class which leaves the written contract unchanged, but treats it as part of an entire oral agreement, the remainder of which was not reduced to writing. Two things, however, are essential to bring a case within this class: First, the writing must not appear upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement, and designed to express the whole arrangement between the parties, for in such a case it is conclusively presumed to embrace the entire contract; second, the parol evidence must be consistent with, and not contradictory of, the written instrument. *Chapin v. Dobson*¹ is an instance of this class, and, although near the border line, illustrates the two requirements just mentioned. In that case it was held competent to show by parol evidence that a written contract to furnish machinery of a specified kind, at a definite price, within a certain time, and to deliver it in a particular way, was part of an entire verbal contract which provided that the machines should be so made that they should do the work of the person who ordered them to his satisfaction. The ground of the decision was that there was nothing on the face of the instrument to show that it was the whole agreement between the parties, and that the oral guaranty did not contradict and was not inconsistent with the written contract. In *Eighmie v. Taylor*² the court had under consideration a written instrument that was regarded as, upon inspection, appearing to be a full, definite and complete agreement of bargain and sale, and therefore held that evidence of a verbal warranty in that case was inadmissible. In the course of the opinion comment was made upon *Chapin v. Dobson*³ in this way: "It was said of the instrument then in question that there was nothing upon its face to show that it was intended to express the whole contract between the parties, the inference being, as was declared in an earlier case, that when a contract does not indicate such intention and design and is one consummated by the

¹ 78 N. Y. 74.³ *Supra*.² 98 N. Y. 288.

writing, the presumption of law arises that the written instrument contains the whole of the agreement, and that when there is such formal contract of bargain and sale executed in writing, there can be no question but that the parties intended the writing as a repository of the agreement itself."¹

The principle upon which parol evidence is held admissible to show that a simple assignment, although absolute in terms, was intended as security merely, is the supposed incompleteness of the instrument, and it is not regarded as contradicting the writing, but as showing its purpose.² Where, however, instead of a mere transfer or assignment, there is a contract appearing on its face to be complete, with mutual obligations to be performed, you can no more add to or contradict its legal effect by parol stipulations preceding or accompanying its execution than you can alter it through the same means in any other respect.³

In the foregoing classification collateral agreements are not included, because they are separate, independent and complete contracts, although relating to the same subject. They are allowed to be proved by parol because they are made by parol, and no part thereof committed to writing. Evidence to explain an ambiguity, establish a custom, or show the meaning of technical terms and the like, is not regarded as an exception to the general rule, because it does not contradict or vary the written instrument, but simply places the court in the position of the parties when they made the contract, and enables it to appreciate the force of the words they used in reducing it to writing. It is received where doubt arises upon the face of the instrument as to its meaning, not to enable the court to hear what the parties said, but to enable it to understand what they wrote, as they understood it at the time. Such evidence is explanatory, and must be consistent with the terms of the contract.⁴ Will anything of value be left of the rule that evidence of what was said between the parties to a valid instrument in writing is incompetent, if it is held that a writing which contains the full definite terms

¹ Citing *Filkins v. Whyland*, 24 N. Y. 338.

³ *Renard v. Sampson*, 12 N. Y. 561.

⁴ *Dana v. Fielder*, 12 N. Y. 40.

² *Thomas v. Scott*, 127 N. Y. 133;
88 N. Y. State Rep. 696.

of a contract, apparently complete, may be shown by oral evidence to be simply part performance of an entire verbal agreement previously made? In other words, if a new contract is to be proven by parol and the written agreement of the parties is to go for nothing; that is to say, if the courts are to go outside of the written instrument to find a stipulation upon which the validity of the contract is to depend, and then to enforce the parol stipulation to the absolute destruction of the written instrument? The very reason of the rule which excludes evidence of declarations is to avoid the uncertainty attendant upon such evidence, and equity should not set aside that important and well-settled rule for the purpose of relieving a party from a risk which, upon his own showing, if it be true, he has voluntarily incurred.

The writings which are protected from the effect of contemporaneous oral stipulations are those containing the terms of a contract between the parties and designed to be the repository and evidence of their final intention. If, upon inspection and study of the writing, read, it may be, in the light of surrounding circumstances, in order to its proper understanding and interpretation, it appears to contain the engagement of the parties, and to define the object and measure the extent of such engagement, it constitutes the contract between them and is presumed to contain the whole of that contract. When the writing does not purport to disclose the contract or cover it; when in view of its language, read in connection with the attendant facts, it seems not designed as a written statement of an agreement, but merely as the execution of some part or detail of an unexpressed contract; when it purports only to state one side of an agreement merely, and is the act of one of the parties only in the performance of his promise,—in these and like cases the exception may properly apply and the oral agreement be shown. For while the general rule is that evidence is inadmissible to ingraft upon or incorporate with a valid written contract an agreement made contemporaneously therewith, and inconsistent with its terms;¹ and that parol conversations preceding a written contract are not

¹ *Huckel v. Guffey*, 37 W. Va. 425; *W. R. Co.*, 48 N. Y. State Rep. 687; *Johnson v. Washburn* (Ala.), 13 S. Richmond & D. R. Co. v. Shomo, 90 Rep. 48; *Simis v. New York*, L. E. & Ga. 74.

allowed to add to or take from the contract,¹ the rule is absolute only where there is no claim that the writing does not contain the whole contract, and where the written contract purports on its face to contain the entire agreement between the parties, and to be an absolute one.² Thus, a parol agreement of a mother, that lands conveyed to her by her daughters shall come back to the latter in equal shares upon her death, is inadmissible as contradicting the deed, notwithstanding such agreement was the consideration of the deed;³ and where a written contract contains no warranty nor guaranty, parol evidence of one is inadmissible.⁴ It is different where defendant disputes plaintiff's claim that the contract was in writing, or alleges that it was procured by fraud, or that it was not a complete contract.⁵ Thus a parol warranty by an assignor of a chattel mortgage, that the mortgage was good, and, if not, that the assignee's money would be refunded, is admissible in evidence, although the assignment was silent on that subject, the fact that the whole agreement was contained in the assignment not being apparent from the paper itself.⁶

Where a contract refers to drawings and specifications but none are annexed to the contract, resort may be had to extrinsic evidence to identify them; and after proper identification it is error to exclude a paper which purports to be such specifications.⁷ For while the general rule which excludes

¹ *Morowske v. Rohrig*, 53 N. Y. State Rep. 220; *Hardin v. Kelley* (Va.), 15 S. W. Rep. 894.

² *Will. M. Kennard Co. v. Cutter Power Co.* (Mass.), 34 N. E. Rep. 460; *Mercantile Bank v. Taylor* (1893), A. C. 317; *Warren v. Phoenix Ins. Co.*, 65 Hun, 621; 47 N. Y. State Rep. 421; *Deuser v. Hamilton*, 52 Mo. App. 394; *Beall v. Fisher*, 95 Cal. 568; *Re Perkins' Estate* (Vt.), 26 Atl. Rep. 637; *Maines v. Henry* (Ala.), 11 S. Rep. 410; *Zimpelman v. Hipwell*, 54 Fed. Rep. 848; *Gasper v. Heimbach* (Minn.), 55 N. W. Rep. 559.

³ *Henning v. Miller*, 66 Hun, 588; 50 N. Y. State Rep. 559.

⁴ *Van Winkle v. Crowell*, 146 U. S. 42; *Naylor v. McSwegan*, 50 N. Y. State Rep. 339; *Plano Mfg. Co. v. Root* (N. Dak.), 54 N. W. Rep. 924; *Ramming v. Caldwell*, 43 Ill. App. 175; *Younglove v. Nelson* (Minn.), 53 N. W. Rep. 629.

⁵ *Chase v. Everts*, 65 Hun, 631; 47 N. Y. State Rep. 425; *Aultman v. Falkum* (Minn.), 53 N. W. Rep. 875.

⁶ *Akberg v. John Kress Brew. Co.*, 65 Hun, 182; 47 N. Y. State Rep. 373.

⁷ *Wegener v. Butler*, 57 N. Y. State Rep. 479.

parol evidence when offered to contradict or vary the terms or legal import of a written agreement is so well settled as not to be a proper subject of discussion, it has many exceptions, and its full application has by the decisions of the courts been restricted within narrow limits. The writings which are protected from the effect of contemporaneous or preceding oral stipulations are those containing the terms of a contract between the parties and designed to be the repository and evidence of their final intention.¹

§ 8. **Illustrations.**—(1) In order to exclude oral proof of a contract the writing must purport to be a complete contract.²

(2) The rule is that in all cases where a writing, although embodying an agreement, is manifestly incomplete, and is not intended by the parties to exhibit the whole agreement, but only to define some of its terms, the writing is conclusive as far as it goes; but such parts of the actual contract as are not embraced within its scope may be established by parol.³

(3) In the absence of fraud or mistake, a contemporaneous or precedent parol agreement cannot be set up to vary or contradict the terms of a written agreement.⁴

(4) All prior contracts, conversations and undertakings relating to the same subject-matter are conclusively presumed to have been merged in the contract reduced to writing and signed by the parties.⁵ Thus where a contract of a sale of

¹ Englehorn v. Reitlinger et al., 122 N. Y. 76; 33 N. Y. State Rep. 276.

² Peterson v. Chicago, R. I. & P. R. Co. (Iowa), 45 N. W. Rep. 573; Alexander v. Thompson, 42 Minn. 498; Moores v. Glover, 37 N. Y. State Rep. 397.

³ Moss v. Green, 41 Mo. 389; Curtis v. Soltan, 34 N. Y. State Rep. 767; Work v. Beach, 59 Hun, 625; 37 N. Y. State Rep. 547; Norton v. Bohart, 105 Mo. 615; T. W. Harvey Lumber Co. v. Herriman, etc. Lumber Co., 39 Mo. App. 214.

⁴ Scarborough v. Alcorn, 74 Tex. 358; De Loach v. Smith, 83 Ga. 665; Chapin v. Baker, 124 Ind. 385; Skeels v. Starrett, 57 Mich. 350; Hills v. Rix

(Minn.), 46 N. W. Rep. 297; Dircks v. German Ins. Co., 34 Mo. App. 31; Dodge v. Kiene (Neb.), 44 N. W. Rep. 191; De Witt v. Berry, 134 U. S. 306; Bopp v. Askins, 31 N. Y. State Rep. 555; Northwestern Fuel Co. v. Brun (N. D.), 45 N. W. Rep. 669; Gordon v. Nieman, 118 N. Y. 152; 28 N. Y. State Rep. 616; McLean v. Nicol (Minn.), 45 N. W. Rep. 15; Tyler v. Waddingham, 58 Conn. 375.

⁵ Jacobs v. Shenon, 2 Conn. 1002; Kaserman v. Friers, 33 Neb. 427; Smith v. Deere, 48 Kan. 416; Johnson v. St. Louis, I. M. & S. R. Co., 141 U. S. 602; Culver v. Wilkinson, 145 id. 205.

goods is in writing and contains no warranty, or where a written contract contains a warranty, parol evidence is not admissible to add a warranty.¹ So where a bond obligates the accused to appear at the "next" term of court, parol evidence of a declaration of the justice that the term for the appearance is later is inadmissible.²

(5) Parol evidence is admissible to prove a verbal agreement that makes the enforcement of an instrument inequitable,³ and therefore parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract, though it may vary, change or reform the instrument.⁴

(6) In the absence of allegations of fraud or mistake; or lack of knowledge of the conditions of the contract, oral representations made before the execution of a written contract are inadmissible to contradict or enlarge the scope of the contract.⁵

(7) Evidence of a parol agreement contemporaneous with a written instrument is admissible in evidence when the writing was obtained on the faith of the parol agreement and an attempt is made to enforce it in violation thereof.⁶

§ 9. **As to bills and notes.**—A prior or contemporaneous parol agreement is not admissible to vary or alter the terms of a note absolute on its face and complete in its terms.⁷ Thus, a maker of a note, in a suit thereon by the payee, is not allowed to testify against the note that it was given for the purpose of a receipt, or was understood by the parties as having the effect of a receipt;⁸ or to show that one who ap-

¹ *De Witt v. Berry*, 134 U. S. 306; *Snow v. Alley*, 151 Mass. 14; *Kessler v. Smith*, 42 Minn. 494; *Patterson v. Ramspeck*, 81 Ga. 808.

² *Crawford County v. Coppock*, 79 Iowa, 482.

³ *Carraher v. Mulligan*, 54 Hun, 638; 28 N. Y. State Rep. 439; *McAtier v. McAtier*, 31 S. C. 313.

⁴ *Ferguson v. Rafferty*, 128 Pa. St. 337.

⁵ *Stavers v. Rogers*, 3 Wash. 603; *Anderson v. Middle & E. T. C. R. Co.*, 91 Tenn. 44; *Taylor v. Davis*, 82

Wis. 455; *Seitz v. Brewers' Refrigerating & Mach. Co.*, 141 U. S. 510.

⁶ *Horner v. Horner*, 145 Pa. St. 258.

⁷ *Reed v. Nicholson*, 37 Mo. App. 646; *Rock Island F. Nat. Bank v. Anderson*, 28 S. C. 43; *Coapstick v. Bosworth*, 121 Ind. 6; *Osborn v. Taylor*, 58 Conn. 439; *Chemical Elec. Light & P. Co. v. Howard*, 150 Mass. 495; *Van Vleet v. Sledge*, 45 Fed. Rep. 743; *Read v. Bank of Attica*, 124 N. Y. 671; 36 N. Y. State Rep. 894; *May v. May*, 36 Ill. App. 77.

⁸ *Stoyell v. Stoyell*, 82 Me. 332.

pears as a joint maker of a note signed merely as surety;¹ or of a prior contemporaneous agreement that the note should be paid from the profits to be realized from the sales of land.² And while as against a third person, who has become in good faith the holder of a promissory note, a defendant, whether a maker or an indorser, cannot escape from the legal import of his former contract by an offer of parol evidence, as between any other parties, evidence showing the real relations of the parties is admissible.³ Thus it may be shown that a note was left with the payee until it should be signed by another person;⁴ or that the indorser signed in a different place than he intended to;⁵ or that it was stipulated in another paper, at the time of the indorsement, that no recourse should be had to the indorser.⁶ But it is held that, in an action by a stockholder of a corporation, evidence that the notes sued on were executed to the plaintiff for a loan by him on condition that they were not to be paid until the corporation should make profits sufficient to pay the advances, is not obnoxious to the rule that parol evidence is inadmissible to vary the terms of a written contract.⁷ And in an action by the payee of a note against indorsers thereon, evidence is admissible that at the time of the indorsement it was agreed that the indorsers should not be personally liable;⁸ or that some of the joint makers signed only as sureties;⁹ or that defendant indorsed the note sued on under an agreement, for a valuable consideration, that his co-indorser was to hold him harmless on his indorsement;¹⁰ or that a note executed by a daughter to her father was in fact executed as a mere receipt or memorandum of an advancement.¹¹ And parol evidence is admissible to show that the use of an accommodation note was restricted by the parties

¹ Aultman & T. Co. v. Gorham, 87 Mich. 233; Cross v. Hollister, 47 Kan. 652.

² Lakeside Land Co. v. Dromegoole (Ala.), 9 S. Rep. 444.

³ Holmes v. Goldsmith, 147 U. S. 150.

⁴ Robertson v. Rowell, 158 Mass. 94.

⁵ Bank of Jamaica v. Jefferson (Tenn.), 22 S. W. Rep. 211.

⁶ Johnson v. Willard, 83 Wis. 420.

⁷ Carraher v. Mulligan, 54 Hun, 638; 28 N. Y. State Rep. 439.

⁸ Kingsland v. Koeppe, 35 Ill. App. 81.

⁹ Vestal v. Knight, 54 Ark. 97.

¹⁰ McPherson v. Weston, 85 Cal. 90; Fullerton v. Hill, 48 Kan. 558.

¹¹ Brook v. Latimer, 44 Kan. 431.

thereto;¹ and to show that it was agreed that an indorsement in blank of a note secured by mortgage was without recourse.²

§ 10. To show that writing apparently absolute is not. Parol evidence is admissible, especially in a court of equity, to show that a writing which upon its face is apparently absolute was intended only as a security; as that a deed apparently absolute was only intended as a mortgage;³ and the same is true as to any transfer of personal property.

§ 11. Statutes of frauds—Admissibility of parol evidence.—The question of the admissibility of conversations preceding a written contract is not merely a question of evidence; it is a question of contract. All negotiations, all conversations preceding a written contract, are conclusively presumed to be merged in it, and whether given in evidence or not, under objection or without objection, they cannot control the written contract, except in the sole case of fraud or mistake. And where the real contract offered to be proved, or testified to, is by its terms not to be performed within one year, or otherwise void by the statute of frauds, it cannot be considered at all under any legal principle, whether there was a proper objection made to it or not.⁴ Evidence of a parol executory contract without new consideration, to modify a written contract under seal before breach, is inadmissible in an action on the latter contract, where the latter conveys an interest in land, and must, under the statute of frauds, be in writing.⁵ It is contrary to both the letter and spirit of the statute of frauds to permit a contract coming within its provisions to rest partly in parol;⁶ and in the absence of proof of part performance, evidence tending to show an oral agreement, or an admission of such an agreement, is incompetent, as such an agreement, if made, would be void under the statute of frauds.⁷ Thus the better opinion is that a written contract falling within the statute of frauds cannot be varied by

¹ *Western Nat. Bank v. Wood*, 46 N. Y. State Rep. 649.

² *Truman v. Bishop*, 83 Iowa, 697.

³ *Stinchfield v. Milikin*, 71 Me. 567; *Dispande v. Walbridge*, 15 N. Y. 374; *Brewster v. Davis*, 56 Tex. 478; *Campbell v. Dearborn*, 109 Mass. 130.

⁴ *Gordon v. Nieman et al.*, 118 N. Y.

152; 28 N. Y. State Rep. 616; *Morowske et al. v. Rohrig*, 53 N. Y. State Rep. 220.

⁵ *Thompson v. Poor*, 57 Hun, 653; 51 N. Y. State Rep. 350.

⁶ *Fortesque v. Crawford*, 105 N. C. 29.

⁷ *Wristen v. Bowles*, 82 Cal. 84.

any subsequent agreement of the parties, unless such new agreement is in writing.¹ There are cases like *Homer v. Guardian Mut. Life Ins. Co.*,² where one party, by agreeing to extend the time for a payment, has induced the other to neglect payment at the appointed day, that it has been held that the former could not take advantage of the neglect. So, also, there are cases like *Dodge v. Crandall*,³ where, for a valuable consideration paid by the debtor, a person buys a mortgage already payable and agrees to extend the time of payment. But where the original contract must have been in writing, before any breach of it has arisen, it cannot be varied by any parol agreement.⁴ Under the statute of frauds the memorandum must contain within itself, or by reference to other writings, all the essential elements of a contract, and when that is the case neither party will be permitted to prove that there was any other contract made than that one. But where the memorandum of a transaction does not contain within itself, or by reference to other writings, all the substantial elements of a contract, but there has been such a performance as to take it out of the operation of the statute of frauds, parol evidence is admissible to supply omissions and to establish contractual relations of the parties.⁵ So a person in possession of land, where his title is not in dispute or involved in the cause, may testify that he owns it;⁶ and in determining the question of a disputed boundary, recourse may be had to every kind of evidence which is competent to prove the existence of a fact in issue.⁷

§ 12. **Bills of lading.**—Parol evidence as to bills of lading are of a dual nature, being both receipts and contracts;⁸ and, so far as they are receipts, parol evidence is admissible to explain or vary them.⁹ But so far as the bill expresses the actual contract between the carrier and shipper, parol evidence is not admissible to alter, vary or explain it.¹⁰ Thus a bill of

¹ *Swain v. Seamens*, 76 U. S. 272.

² 67 N. Y. 481.

³ 30 N. Y. 306.

⁴ *Thompson v. Poor et al.*, 57 Hun, 285; 32 N. Y. State Rep. 371.

⁵ *Routledge v. The Worthington Co.*, 119 N. Y. 592; 30 N. Y. State Rep. 195.

⁶ *Bexar County v. Berrell* (Tex.), 14 S. W. Rep. 62.

⁷ *Scott v. Yard*, 46 N. J. Eq. 79.

⁸ *Groves v. Harwood*, 9 Barb. 77.

⁹ *O'Brien v. Gilchrist*, 34 Me. 554; *Hendricks v. Steamer Morning Star*, 18 La. Ann. 353.

¹⁰ *White v. Van Kirk*, 25 Barb. 16;

lading which states that the goods are received in good order is to that extent a receipt, and may be contradicted if there were defects not known to the carrier when the receipt was given.¹ So any error or mistake as to the quantity of the goods may be shown.² But it cannot be shown that an additional quantity of goods were to be shipped;³ or that the rate of transportation was to be conditional.⁴

§ 13. **Subsequent changes of contract.**—It is competent to show that parties in their dealings under a written contract varied its terms by a subsequent parol agreement.⁵ And a condition required by a written instrument under seal, that an act be performed or evidenced, may be waived by parol, and the acts going to establish the waiver may be shown by parol.⁶ But it is different as to a sealed contract before a breach.⁷ Evidence that parties to a writing have, subsequent to its execution, agreed orally to waive and dispense with some of the provisions, and that they have actually complied with such oral agreement, is not inadmissible as varying the terms of a written contract.⁸ The time for the performance of a contract, whether under seal or not, may be enlarged by parol.⁹ Thus, evidence of a parol extension of the payment of a note, made subsequent to the making of the note, is not inadmissible as tending to vary or contradict the written contract.¹⁰ But an alleged contemporaneous parol modification of a written contract for the sale of land cannot be introduced as a defense to an action to foreclose a vendor's lien for the purchase price.¹¹

§ 14. **Bills of sale — Parol evidence to vary.**—Bills of sale are contracts and presumed to embody all that was agreed

Cox v. Paterson, 30 Ala. 608; Arnold v. Jones, 26 Tex. 335.

¹ Blade v. Chicago, etc. R. Co., 10 Wis. 4.

² Groves v. Howard, 9 Barb. 477.

³ Sayward v. Stevens, 3 Gray, 97.

⁴ White v. Van Kirk, 25 Barb. 16.

⁵ Conrod v. Fisher, 37 Mo. App. 352; Robinson v. Hardy, 22 Ill. App. 512; Nightingale v. Eiseman, 121 N. Y. 288; 30 N. Y. State Rep. 995; Grange v. Palmer, 56 Hun, 481; 31 N. Y. State Rep. 612; Neiswanger v.

McClellan, 45 Kan. 599; Corson v. Berson, 86 Cal. 433; Storer v. Taber, 83 Me. 387.

⁶ O'Brien v. Prescott Ins. Co., 134 N. Y. 28; 32 N. Y. State Rep. 579.

⁷ Thompson v. Poor, 57 Hun, 285; 32 N. Y. State Rep. 371.

⁸ Smith v. Roberts, 43 Minn. 342; O'Keefe v. St. Francis Church, 59 Conn. 551.

⁹ Triess v. Rider, 24 N. Y. 367.

¹⁰ Grace v. Lynch, 80 Wis. 166.

¹¹ Stevens v. Flanagan, 131 Ind. 122.

upon between the parties, and are subject to the same rules as other contracts.¹ Thus, where a sale of property reduced to writing contains all the elements requisite to show a contract between the parties, but contains no warranty of the goods, parol proof is not, in the absence of fraud, admissible to show a warranty in fact;² nor can any other contract be interpolated into it;³ as to show that it was intended as a trust or an assignment;⁴ or that the sale was made by more persons than those executing it; or that it was intended to embrace more property than that named therein;⁵ or that property within its provisions was in fact excepted;⁶ or that the title and possession of the property was not to rest in the vendee immediately.⁷ But in order to exclude such proof, the bill of sale must contain all the essential elements of a contract, leaving nothing open to parol proof; a mere bill of goods, as that A. bought of B. certain articles at a certain price, is not a contract, and is open to parol proof to show any fact connected with and material to the transaction.⁸

§ 15. **Written assignments — Parol evidence as to.**— Where the property or choses in action are assigned by an instrument in writing, which purports to embrace the entire contract, it is subject at law to the general rule that parol evidence is not admissible to vary or contradict it;⁹ but in equity such evidence is admissible to show that, although absolute in form, it is not so in fact;¹⁰ as, that an assignment of a mortgage to one person, by name, was in fact intended for the benefit of another as well as himself.¹¹ So fraud may be shown, and the real consideration of an assignment may be shown.¹² Evidence is not admissible to show that other property than that named in the agreement was intended to have been embraced therein.¹³

¹ Champlin v. Butler, 18 Johns. 169.

² Houghton v. Carpenter, 40 Vt. 588.

³ Smith v. Gibbs, 44 N. H. 335.

⁴ Frasier v. Sneath, 3 Nev. 120.

⁵ McCloskey v. McCormick, 37 Ill. 66.

⁶ Harrell v. Dorrance, 9 Fla. 490.

⁷ Davis v. Moody, 15 Ga. 175.

⁸ Lindsley v. Lovely, 26 Vt. 123;

Silliman v. Tuttle, 45 Barb. 171; Filking v. Whyland, 24 N. Y. 338; Dana v. Fielder, 12 id. 40.

⁹ Durgin v. Ireland, 14 N. Y. 822.

¹⁰ Rhodes v. Farmer, 17 How. (U. S.) 464.

¹¹ Brown v. Isbel, 11 Ala. 109.

¹² Galway's Appeal, 34 Pa. St. 242.

¹³ Taylor v. Sayre, 24 N. J. L. 647.

§ 16. **True party and character of party.**—It is competent to prove by parol the relation of the parties to a contract, and any intrinsic facts affecting the equities;¹ thus, where one partner took a deed and gave back a mortgage, it may be shown to have been a firm transaction.² And where a policy is issued on property “held in trust,” parol evidence is admissible to show who are the owners, or who were intended to be insured thereby;³ and to show who are the beneficiaries in a policy of life insurance;⁴ and to show that one signer of a bond was a principal and another surety;⁵ and as between indorsers, that a second indorser intended to become the first;⁶ and that an indorser was to be liable before the payee of a note;⁷ and that some person other than the grantee paid for the land mentioned in a deed;⁸ and that a contract under seal, made by the president of a bank in his own name, was made for the use and benefit of the bank.⁹ It is also competent to prove a promise to pay by one sued on a note, in connection with evidence that he adopted the signature thereto as his own, although his name does not appear as the signer of the note.¹⁰ But parol evidence is inadmissible in an action upon a covenant of seisin to show that one of the defendant’s grantors was the intended grantee in a deed upon which defendant’s title depends, and which omits to name a grantee.¹¹

§ 17. **Written leases — Parol evidence as to.**—Where a lease contains no warranty that the premises are fit for occupation, it is not competent to show that the landlord represented them to be so. It is not competent to show by parol that certain other premises were intended to be in-

¹ *Carraher v. Mulligan*, 54 Hun, 638; 28 N. Y. State Rep. 439.

² *Johnson v. Donovan*, 20 N. Y. State Rep. 30; 50 Hun, 215.

³ *California Ins. Co. v. Union Congress Co.*, 133 U. S. 387.

⁴ *Norrison Title T. & S. D. Co. v. John Hancock Mut. Life Ins. Co.*, 132 Pa. St. 385.

⁵ *Williams v. Mocatie (Va.)*, 10 S. E. Rep. 1061; *Schofield v. Jones*, 85 Ga. 816; 42 Alb. L. J. 418.

⁶ *Wyckoff v. Wilson*, 30 N. Y. State Rep. 384.

⁷ *Deering v. Creighton (Oreg.)*, 24 Pac. Rep. 198.

⁸ *Ducie v. Ford*, 138 U. S. 587.

⁹ *Northern Nat. Bank v. Lewis*, 78 Wis. 475.

¹⁰ *Salomon v. Hopkins*, 61 Conn. 47; *Waddill v. Sabree*, 88 Va. 1012; *Fonda v. Burton*, 63 Vt. 355; *Munroe v. Williams*, 35 S. C. 572; *Liddell v. Sahline*, 55 Ark. 627.

¹¹ *Allen v. Allen*, 48 Minn. 462.

cluded in a lease; or that certain premises named therein were intended to have been excluded; or that 'more or less rent was agreed upon;¹ or that it was to be paid at a different time than that named in the lease; or that the lease was to commence at some other date; or that other rights and privileges than those named in the lease were given;² or that the landlord agreed to repair the premises. But parol evidence is always admissible to defeat the lease;³ or to show to what premises the lease applies.³ It is a rule of construction that in order to arrive at the real intention of the parties, and to make a correct application of the words and language of the contract to the subject-matter thereof, and the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration.⁵ It may be shown that the lease was made for the benefit of a person other than the lessor; as, where a lease was made by an administrator in his own name, that it was in fact made for the benefit of the estate.⁶ So, where no time when the lease shall commence is named therein, it is competent to show what time was fixed upon by parol;⁷ or that the landlord knew the purpose for which the lessee intended to occupy the premises. Where in a lease it is stipulated that the lessee "shall have all the personal property," it is proper to show by parol whether he was to have it absolutely, or only the use of it.⁸

§ 18. Collateral contract by parol.—It is only such matters as concern a subject embraced in and covered by the terms of a written contract that must be incorporated in it, and that are deemed to be waived if not so incorporated, although they have been the subject of prior negotiation and agreement between the contracting parties. Thus, an agreement by a lessor to put premises in repair before the term is collateral to a lease, and is not required to be incorporated in it, and parol evidence of such agreement is admissible. Had

¹ *Tibbetts v. Percy*, 24 Barb. 39.

² *Sientes v. Odier*, 17 La. Ann. 153.

³ *Pierce v. Wilson*, 34 Ala. 596.

⁴ *Harris v. Dub*, 57 Ga. 77; *Lawrence v. Hyman*, 79 N. C. 209; *Alger v. Kennedy*, 49 Vt. 109.

⁵ *Best on Ev.* 198.

⁶ *Russell v. Erwin*, 41 Ala. 292.

⁷ *Leggett v. Harding*, 10 Ind. 414.

⁸ *Knapp v. Marlboro*, 29 Vt. 282.

it been an agreement on the part of the lessor to make repairs, or to keep the premises in repair during the term, it would have fallen within the general rule; but an independent agreement to put the premises in repair before the term, and made as a condition of, or consideration for, the taking of the lease, stands upon a different footing.¹ It is never admissible to show that, at the time a written contract was made, an agreement by parol relating to the same subject-matter was also entered into; but a parol agreement collateral to or independent of such written contract may be shown when it relates to a matter about which the writing is silent;² or to show a new and independent contract relating to the same subject-matter subsequently entered into by parol, whether it is a substitute for the old contract or is an addition to it.³ If the new contract covers the whole subject-matter of the written one, it supersedes and extinguishes it, and it is merged in the parol contract.⁴ The general rule requires the rejection of parol evidence when offered to cut down or take away obligations entered into between the parties and by them put in writing. It would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement between the parties, should be controlled by an averment of the parties to be proved by uncertain testimony of slippery memory. It does not apply, therefore, where the original contract was verbal and entire and a part only reduced to writing. Nor has it any application to collateral undertakings. And these facts are always open to inquiry and may be proved by parol.⁵ In *Jeffreys v. Walton*⁶ the contract for the hire of a horse was in writing, and it was further agreed by parol that accidents occasioned by his shying should be at the risk of the hirer. The horse shied and in consequence was injured. In a suit for damages it was held that parol

¹ *Mann v. Nunn*, 43 L. J. (C. P.) 241; *Clenighan v. McFarland*, 34 N. Y. State Rep. 624.

² *Flanders v. Fay*, 40 Vt. 316; *Keough v. McNitt*, 6 Minn. 513.

³ *Cummings v. Putnam*, 19 N. H. 969; *Van Buskirk v. Roberts*, 31 N. Y. 661.

⁴ *Bernard v. Sampson*, 12 N. Y. 561.

⁵ *Filkins v. Whyland*, 24 N. Y. 344; *Potter v. Hopkins*, 25 Wend. 417; *Grierson v. Mason*, 60 N. Y. 394.

⁶ 1 Stark. 385.

evidence of that portion of the agreement which was not in writing was admissible. In *Batterman v. Pierce*¹ the action was upon a note given for wood on plaintiff's land. The defense was a verbal agreement made at the same time by plaintiff, that if anything happened to the wood through his means or by setting fire to his fallow he would be accountable, and would guaranty the purchasers against any damages in consequence of firing his fallow. The fallow was burned and the wood also. The defense prevailed, the court holding that the same result would follow whether the contract of both parties had been written out, or whether all rested in parol without writing, saying, "nor can it make any substantial difference that the undertaking of one party has been reduced to writing while the engagement of the other party remains in parol;" and, to the objection that the defense contradicted the note, said there was "nothing in it." "The defendants do not deny that they made just such a contract as that on which the plaintiff seeks to recover, but they allege that the plaintiff at the same time entered into an agreement on his part which has subsequently been broken." The later cases of *Morgan v. Griffith*² and *Erskine v. Adeane*³ explain the exceptions. They were considered in *Johnson v. Oppenheim*,⁴ and there said to be within the rule which allows a collateral agreement made prior or contemporaneous with a written agreement, but not inconsistent with or affecting its terms, to be given in evidence. In *Wilson v. Deen*⁵ the court seems to have gone out of the regular line of decisions. For in *Angell v. Duke*⁶ the plaintiff was held entitled to recover damages for the breach by the lessee of an agreement similar to that in *Wilson v. Deen*, the court holding it to be collateral to the demise. So in *Mann v. Nunn*,⁷ where a lessor promised that if the proposed lessee would take the lease of a house he would put the house in a state fit for habitation, the promise was held to be collateral to the written lease and provable by parol evidence for the purpose of recovering damages for the breach of it. Whether the matter relied

¹ 3 Hill, 171.² L. R. 6 Ex. 70.³ L. R. 8 Ch. App. 756.⁴ 55 N. Y. 280.⁵ 74 N. Y. 531.⁶ L. R. 10 Q. B. 174.⁷ 43 L. J. (C. P.) 241.

upon to reduce or defeat the plaintiff's claim is set up by answer, as in *Spaulding v. Vandercook*¹ and *Batterman v. Pierce*,² or is made the subject of a cross-action, as in *Morgan v. Griffith*³ and *Ersine v. Adeane*,⁴ can make no difference.⁵ Thus, in an action by an assignee of a bill of lading, indorsed by the carrier to a bank as security for plaintiff's acceptance and payment of an accompanying draft, where the defendants are not parties to the draft or privies, the fact of acceptance of it by the plaintiff is collateral to the issue, and the fact of acceptance may be proved by parol. *A fortiori* may a party to it, in such a controversy, prove by parol that it had existence. So the fact of a tenancy may be proved by parol, though there be a written lease.⁶ The principle seems to be that the contents of a written instrument cannot be given in evidence by parol when the contract contained in it is the subject of the suit; but the existence of the relation under the instrument, and the fact of the existence of it, may be.⁷

§ 19. *Illustrations.*—(a) Parol evidence may be said to be primary where the writing is not admissible to prove the facts to establish which the oral proof is offered,⁸ or where it is offered to establish a matter collateral to or distinct from the writing;⁹ as, the consideration or failure of the consideration of a note,¹⁰ guaranty or other contract or obligation, where the consideration is not specifically stated in the instrument.¹¹

(b) Reputed ownership may be proved by parol in a case where the question of title is collateral or incidental matter.¹²

(c) As between the immediate parties to a note, parol evidence is admissible to annex qualifications, or a special contract even.¹³ Thus, as between an indorser and his immediate indorsee, it is competent to show a waiver of demand and notice of non-payment made at the time of indorsing in blank.¹⁴

¹ 2 Wend. 432.

² 3 Hill, 171.

³ L. R. 6 Ex. 70.

⁴ L. R. 8 Ch. App. 756.

⁵ *Chapin et al. v. Dobson*, 78 N. Y. 74.

⁶ *Rex v. Kingston-upon-Hull*, 7 B. & C. 611.

⁷ *Sprague v. Hosmer*, 82 N. Y. 466.

⁸ *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213; *Hodson v. Goodale*, 22

Oreg. 68; *Sparks v. Rowles*, 17 Ala. 211.

⁹ *Sheil v. Stark*, 14 Ga. 429.

¹⁰ *Long v. Davis*, 18 Ala. 801.

¹¹ *Merle v. Matthews*, 26 Cal. 455.

¹² *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213; *Hodson v. Goodale*, 22 *Oreg.* 68.

¹³ *Mendenhall v. Davis*, 72 N. C. 150.

¹⁴ *Dye v. Scott*, 35 Ohio St. 194; 35 *Am. Rep.* 604.

(*d*) Generally it may be said that parol proof of any collateral parol agreement may be given which does not interfere with the terms of the written contract, although it may relate to the same subject-matter.¹ But evidence of any collateral agreement is inadmissible, even between the parties, which in any manner varies or changes the terms of the contract.²

(*e*) Proof of the execution of a writing collateral merely to the issue is admissible without its production or accounting for its absence.³

(*f*) The rule as to the production of written communications or agreements has no application when they are merely collateral to the issue. Thus, payment of contracts, and of judgments even, may be proved by parol, although they may be written or even record evidence of the fact.⁴ But not to show that a receipt was given, or that an indorsement of the amount was made upon a note or upon an execution.⁵

(*g*) The rule is that, where the narrative of an extrinsic fact has been committed to writing, the fact may nevertheless be proved by parol. So where an oral and written notice to the same effect are served upon a party, the written notice need not be produced, unless the law makes a written notice imperative.⁶

(*h*) Evidence of a parol contract proving a distinct collateral fact not inconsistent with a written contract is admissible;⁷ thus, there is no such necessity of the sleeping-car service, or such sufficient reason for giving the berth-check issued to passengers on a sleeping-car, upon the surrender of their tickets, conclusive force as evidence of the contract between the passengers and the sleeping-car company, as to exclude parol evidence of the agreement made between the conductor and passenger.⁸

¹ *Ruggles v. Swanwick*, 6 Minn. 526; *Carr v. Dooley*, 119 Mass. 294.

² *Rodney v. Wilson*, 76 Mo. 123; 29 Am. Rep. 499; *Doolittle v. Ferry*, 20 Kan. 230.

³ *Coonrod v. Madden*, 126 Ind. 197; *State v. Ferguson*, 107 N. C. 841; *Smith v. Dinkelspiel*, 91 Ala. 528.

⁴ *Kingsbury v. Moses*, 45 N. H. 222.

⁵ *Daniels v. Johnson*, 29 Ga. 207.

⁶ *Smith v. Young*, 1 Camp. 439; *Hadden v. People*, 25 N. Y. 373.

⁷ *Stallings v. Gottschalk* (Md.), 26 Atl. Rep. 524.

⁸ *Mann Boudoir Car Co. v. Dupre*, 54 Fed. Rep. 646; 47 Alb. L. J. 446; *Wichita U. of R. C. in U. S. v. Schweiter*, 50 Kan. 672; *Vejar v. Mound City L. & W. (Cal.)*, 32 Pac. Rep. 713.

§ 20. To show a deed to be a mortgage.—The rule that a deed may, in an action between the parties to it, be shown by parol evidence to have been given and received to secure the payment of a debt, is firmly established.¹ The burden of establishing oral defeasance to such a deed is an onerous one, resting on whomsoever alleges it, and its existence and also its precise terms must be established by clear and conclusive evidence; otherwise the strong presumption that the deed expresses the entire contract between the parties to it is not overcome. And to convert a deed, absolute on its face, into a mortgage by parol testimony, such testimony must be clear and specific, of a character such as will leave in the mind of a judge no hesitation or doubt, and failing this, the efforts to impeach the legal character of the deed must be regarded as abortive. The testimony must be entirely plain and convincing beyond reasonable controversy.² Each case must be determined upon its own special facts, but those should be of a clear and decisive import.³ The principle upon which parol evidence is held admissible to show that a simple assignment, although absolute in terms, was intended as security merely, is the supposed incompleteness of the instrument; and it is not regarded as contradicting the writing, but as showing its purpose.⁴ It grew up in the equity courts from the efforts of equity judges to prevent forfeitures, to relieve against fraud, and to enforce the equitable maxim, “once a mortgage always a mortgage.” It was supposed that the evidence did not contradict the instrument, but simply showed the purpose for which it was given, and that the instrument, although purposely made absolute, was so made, however, simply for the purpose of giving security to the party to whom it was given, which was not really inconsistent with its form. Hence it was conceived that parol evidence showing the purpose was not an invasion of the general rule forbidding such evidence to vary, explain or contradict a written

¹ Jones on Mortgages, ch. 8; 3 Ensign v. Ensign, 120 N. Y. 655; 31 Pom. Eq. Juris., § 1196. N. Y. State Rep. 657.

² Lance's Appeal, 112 Pa. St. 467; Howland v. Blake, 97 U. S. 626; Cadman v. Peter, 118 id. 73; Barton v. 145.

³ Campbell v. Dearborn, 109 Mass. 145.
⁴ Truscott v. King, 6 N. Y. 147; Chister v. Bank of Kingston, 16 id. 336; Horn v. Keteltas, 46 id. 605.

instrument. Where a deed is given as security merely, for an indebtedness of the grantor to the grantee, that fact may be proved by parol evidence; but that is an exception to the general rule that the terms of a deed cannot be changed by oral evidence. It has never been held that a deed can be so far contradicted by parol as to show that it was not intended to operate at all, or that it was the intention or agreement of the parties that the grantee should acquire no rights whatever under it, or that he should reconvey to the grantor on his request without any consideration.¹ This rule does not hold good where the instrument was not an assignment simply, but a contract containing mutual agreements.²

§ 21. Conditions upon which a writing was delivered.—Instruments not under seal may be delivered to the one to whom, upon their face, they are made payable, or who, by their terms, is entitled to some interest or benefit under them upon conditions, the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it or others having notice. It needs a delivery to make the obligation operative at all; and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which delivery is made.³ Oral proof of a condition precedent to the validity of a written contract, if not contradictory of its terms, is always admissible, because, like evidence of fraud and duress, it goes, not to the alteration, but to the defeat of the contract. Evidence of the non-compliance with an extrinsic oral stipulation upon which the validity of the paper as an operative instrument is suspended is simply proof that there was no contract, and so is consistent with the familiar principle.⁴ This rule should be cautiously applied to avoid mistake or imposition, and confined strictly to cases within its reason. Certainly the general rule, which excludes evidence of parol negotiations and undertakings when offered to contradict or substantially vary the legal import of

¹ *Hutchins v. Hutchins*, 98 N. Y. 56.

⁴ *Norris v. Tiffany*, 56 N. Y. State

² *Marsh v. McNair*, 99 N. Y. 174.

Rep. 406.

³ *Reynolds v. Robinson*, 18 N. Y.

235; *Benton v. Martin*, 52 id. 570.

a written agreement, is not to be questioned or disturbed. It is so well settled in reason, policy and authority as not to be a proper subject of discussion. It has full application, however, within very narrow limits. In the first place, it applies only in controversies between parties to the instrument,¹ and between them is subject to exceptions upon allegations of fraud, mistake, surprise or part performance of the verbal agreement. Nor does it deny the party in whose favor that agreement was made the right of proving its existence by way of defense in an action upon the written instrument, under circumstances which would make use of it, for any purpose inconsistent with that agreement, dishonest or fraudulent.² A party sued by his promisee is always permitted to prove by parol that the instrument was delivered even to the payee to take effect only on the happening of some future event,³ or that its design and object were different from what its language, if alone considered, would indicate.⁴ He may also show that the instrument relied upon was executed in part performance only of an entire oral agreement;⁵ or that the obligation of the instrument has been discharged by the execution of a parol agreement collateral thereto;⁶ or he may set up any agreement in regard to the instrument which makes its enforcement inequitable. In *Juilliard v. Chaffee*⁷ the apparent obligation incurred by the defendant under a paper put in evidence by the plaintiff was to pay the sum named upon demand in consideration of so much money then borrowed; but the evidence disclosed that it was only part of a prior parol arrangement, by the terms of which the payees were to advance money in anticipation upon debts owing by them, and on defendant's promise that it should be so paid in discharge of those debts, and which also provided for a return of the

¹ *New Berlin v. Norwich*, 10 Johns. 229.

² *Martin v. Pycroft*, 2 De G., M. & G. 785, 795; *Jervis v. Berridge*, L. R. 8 Ch. App. 351.

³ *Seymour v. Cowing*, 1 Keyes, 532; *Benton v. Martin*, 52 N. Y. 570; *Eastman v. Shaw*, 65 id. 522.

⁴ *Denton v. Peters*, L. R. 5 Q. B. 474; *Blossom v. Griffin*, 3 Kern. 569;

Hutchins v. Hubbard, 34 N. Y. 24; *Barker v. Bradley*, 42 id. 316; *Grier-son v. Mason*, 60 id. 394; *De Laval-lette v. Wendt*, 75 id. 579; 31 Am. Rep. 494.

⁵ *Chapin v. Dobson*, 78 N. Y. 74; 34 Am. Rep. 512.

⁶ *Crossman v. Fuller*, 17 Pick. 171. 792 N. Y. 529.

paper to the defendant when the money was so applied. The note did not constitute the agreement. It was evidence of part of the agreement, and the maker was properly allowed to show in defense the whole transaction;¹ and when that was shown, the defense was made out, not by controlling the contract indicated by the writing, but by a collateral agreement with which it was incidentally connected. In all these cases a distinction is recognized between an agreement for the legal discharge of a contract and one which destroys its original legal effect either by contradicting its terms or substituting a distinct and independent agreement.

§ 22. Illustrations.—(1) Evidence of a parol agreement made at or prior to the time of a written agreement and as a condition of its delivery is not admissible when it does not fall within any of the exceptions to the rule forbidding oral evidence to vary the terms of a written contract.² Thus it is inadmissible to show whether a deed which has been delivered shall take effect absolutely or only on condition of the grantor's death.³

(2) An oral condition that an order shall "be no sale" if the market price is not as it is represented is a condition subsequent and not precedent, and cannot be proved to affect the terms of an unconditional written order;⁴ or that promissory notes delivered to the payee were not to take effect upon the fulfillment of a certain condition.⁵

(3) A father, having conveyed lands directly to a child, cannot show by parol that he intended a resulting trust to himself.⁶ And evidence of a parol agreement creating an express trust in favor of a husband in lands purchased by him, but conveyed to his wife, is inadmissible;⁷ or that an absolute conveyance was intended to operate as a conditional sale, or a sale with the right to repurchase;⁸ or to show that the con-

¹ 1 Greenl. Ev., § 284a.

² Genett v. Delaware & H. C. R. Co., 122 N. Y. 505; 34 N. Y. State Rep. 246.

³ Morey v. Heney, 86 Cal. 471; Hubbard v. Greeley, 84 Me. 340.

⁴ Lilienthal v. Suffolk Brew. Co., 154 Mass. 185; 26 Am. St. Rep. 234.

⁵ Garner v. Fite, 93 Ala. 405; Dex-

ter v. Ohlander, id. 441; Cunningham v. Martin, 46 Kan. 352.

⁶ Annis v. Wilson, 15 Colo. 236.

⁷ Montgomery v. Craig, 128 Ind. 48; Gowdy v. Gordon, 122 id. 533.

⁸ Peagler v. Stabler, 91 Ala. 308; Thomas v. Scutt, 127 N. Y. 133; 35 N. Y. State Rep. 692.

sideration of notes bought by a *bona fide* indorsee was a conditional one;¹ or that a deed was given upon a condition that the grantee should pay certain notes of the grantor;² or in a suit on the written subscription of a stockholder in a corporation that the subscription was a conditional one.³

(4) Parol evidence is admissible to show a conditional delivery of an instrument which is not a deed, and does not relate to the transfer of the possession of land.⁴ Thus it is admissible to show that a contract was not to become valid until the signing of a certain other contract by another person;⁵ or that a real-estate agent was invested by his principals with the title to property for convenience in making sales thereof, and not as absolute purchaser;⁶ or that a conveyance was in trust to sell for the vendor's benefit;⁷ or that a deed is in fact a mortgage;⁸ or that a deed-poll in consideration of love and affection was intended to operate as a will;⁹ or that the condition on which a note was signed was never performed, and that no valid delivery thereof has been made;¹⁰ or that a note was given with the express understanding that it should remain in the hands of a third person awaiting a settlement;¹¹ or that a mortgage absolute on its face was given for future advances.¹²

(5) A verbal condition accompanying a written lease of the upper floors of a building, the only access to which is by a hall and stairs, that the lessor will not rent the lower floor for a saloon, or permit a door to be cut in the wall between the hall and the lower floor, constitutes a part of the consideration of the lease, and is admissible in evidence in a suit to abate a door cut in violation of such condition.¹³

(6) An implied or resulting trust may be established by

¹ *Haffron v. Cunningham*, 76 Tex.

4. 312.

² *Boozar v. Teague*, 27 S. C. 348.

³ *Masonic Temple Ass'n v. Channell* (Minn.), 45 N. W. Rep. 716.

⁴ *Blewitt v. Boorum*, 59 N. Y. Supr. Ct. 321; 39 N. Y. State Rep. 244.

⁵ *Round Lake Ass'n v. Kellogg*, 58 Hun, 605; 34 N. Y. State Rep. 405.

⁶ *Russell v. Andre* (Wis.), 48 N. W. Rep. 117.

⁷ *Bitely v. Bitely*, 85 Mich. 227.

⁸ *McNeel v. Aldridge*, 34 W. Va.

748; *McLean v. Ellis*, 79 Tex. 398;

Smith v. Smith, 81 id. 45.

⁹ *Re Slinn*, L. R. 15 P. D. 156.

¹⁰ *Solenberger v. Gilbert*, 14 Va. L. J. 406.

¹¹ *Lipcomb v. Lipcomb*, 32 S. C. 243.

¹² *Louisville Banking Co. v. Leonard*, 11 Ky. L. Rep. 917.

¹³ *Lynch v. Hunneke*, 46 N. Y. State Rep. 868.

parol evidence of the transaction out of which it arises,¹ and to prove a trust in lands created by parol after it has been terminated by a conveyance of the property by the trustee.²

(7) Parol evidence is admissible, even in the absence of fraud or mistake, to show that a deed absolute in form, conveying the grantor's interest in certain patents, the express consideration of which is nominal, was executed in furtherance of a prior contract for the manufacture and sale of articles patented by the grantor, the grantee's interest in which was to be reconveyed upon his electing to terminate the contract.³

(8) In an action upon a written lease for rent payable in advance, it may be shown that the lease was executed and delivered upon a parol agreement that it should not take effect unless possession was delivered at a certain time.⁴ A deed, assignment or bill of sale absolute on its face may be shown to have been given as security for the payment of a debt.⁵

§ 23. **Immovables, inscriptions, etc.**—Inscriptions on monuments, tombstones, walls, surveyor's marks upon trees, or notices affixed to boards and other immovables, are evidence. It must be remembered, however, that in the case of notices so affixed to walls, etc., it must appear that the document was affixed to the freehold and could not easily be removed. This is upon the ground that the production of primary evidence is physically impossible, and that public convenience requires that such evidence should be received, and stands upon the same ground that copies of documents deposited in a foreign country when the laws or established usages of such country will not permit its removal. The same rule prevails as to the books of custom-houses.⁶ The principle of law is that, where you cannot get the best possible evidence, you must take the next best; and where the law has laid down that you cannot remove the documents in which the writing is made, you may prove whose handwriting it was.

¹ Ripley v. Seligman, 88 Mich. 107. Rep. 674; Lawrence v. Phillips, 67

² Silvers v. Potter (N. J. Ch.), 48 N. Hun, 61; 51 N. Y. State Rep. 374.
J. Eq. 539.

³ Barry v. Colville, 129 N. Y. 302; Pac. Rep. 687; Shad v. Livingston, 41 N. Y. State Rep. 628; Conant v. 31 Fla. 89; Davis v. Hopkins, 18 Roseborough, 139 Ill. 383. Colo. 153.

⁴ Corn v. Rosenthal, 48 N. Y. State ⁵ Rex v. King, 27 B. 234.

§ 24. **Warranty.**—Where a contract of sale is evidently incomplete, being an informal bill or receipt and not intended to embrace the entire contract, parol evidence of a warranty of the property is admissible.¹ But the rule is that where a contract for the sale of property has been reduced to writing and is evidently complete in itself, it is not competent for the parties to engraft new terms or conditions thereon in the form of a warranty.² Thus, proof of a contemporaneous warranty is inadmissible in an action upon a written contract for the sale of machinery.³ But a memoranda on the bottom of a bill of a meat-cooler in these words, “Guaranty: The above cooling room is guarantied to keep fresh meat a satisfactory length of time if properly iced and regulated,” will not exclude parol proof by the purchaser that a different contract of warranty was made at the time of the sale.⁴

§ 25. **Judicial records.**—Judicial records import verity on their face, and parol evidence is inadmissible to vary, contradict or explain them.⁵ Thus, parol evidence cannot be given to contradict recitals in a record as to appearance of parties and the like;⁶ as, the recitals as to the return of an officer;⁷ or that no demand was made before action;⁸ or that no fraud was shown on the trial;⁹ or that commissioners held no meeting when their report shows that they did.¹⁰ Parol evidence may, however, be given to show what was litigated upon the trial, but it must be consistent with the record and cannot be admitted to contradict it.¹¹ Thus, parol evidence cannot be

¹ Chapin v. Dobson, 78 N. Y. 714; v. Consumers' Gas Co., 47 Fed. Rep. Henson v. Henderson, 21 id. 224; 43.

Perrins v. Cooley, 39 N. J. L. 449; ⁴ Richey v. Daemicke, 86 Mich. 647. Atwater v. Clancey, 107 Mass. 369. ⁵ Townsend v. Fotenot, 42 La. Ann. 890.

² Ethridge v. Balin, 72 N. C. 213; 890.

Frost v. Blanchard, 97 Mass. 155; ⁶ Bentley v. Brown, 123 Ind. 552.

Namberg v. Young, 35 N. J. L. 331; ⁷ Davis v. Sawyer (N. H.), 20 Atl. Rep. 100.

Most v. Pierce, 58 Iowa, 579; Rich v. ⁸ Williams v. Lewis, 131 Ind. 344.

Forsyth, 41 Md. 389. ⁹ Case v. Gordon, 33 Mo. App. 597;

³ Hungerford Co. v. Rosenstein, 46 N. Y. State Rep. 195; Lamson Consolidated Store Ser. Co. v. Hartung, 46 N. Y. State Rep. 191; McMullen v. Carson, 48 Kan. 263; Harrow Spring Co. v. Whipple Harrow Co., 90 Mich. 147; American Electric Constr. Co.

People v. Hoas, 79 Mich. 449.

¹⁰ Quick v. River Forest, 130 Ill. 323;

Brooks v. Mayor of New York, 57 Hun, 104; 32 N. Y. State Rep. 559.

¹¹ Lorillard v. Clyde, 122 N. Y. 41; 33 N. Y. State Rep. 303.

given to show that no witnesses were sworn or hearing had,¹ or that no notice has been given where the record shows that there has been.² But parol evidence may be given to show that a judgment for defendant "was admitted without prejudice;"³ or as to whether or not the merits were inquired into in a prior suit for the same cause;⁴ or that no proof was offered to support the plea of former action pending.⁵ And in an action on a judgment the defendant may allege and prove illegality of the judgment, etc.⁶

Parol evidence may be given to show the facts for the purpose of amending a record;⁷ and for the purpose of showing that the court had no jurisdiction.⁸ So where the record is silent as to the precise claim upon which the judgment was predicated, it may be shown by reference to the pleadings or by parol, as to identify the note on which it was rendered.⁹ The parties to a judgment may be identified by parol. A judgment in partition is competent evidence for or against both parties and strangers as constituting a part of the chain of title.¹⁰ Such a judgment setting off to one a portion of property claimed in common with others is equivalent to a quitclaim deed from the other parties to the suit of their respective interests, and is competent though not conclusive evidence in his behalf, although the other parties were not parties to the suit.¹¹

§ 26. **Mistake.**—Parol evidence is admissible to show a mistake in a deed or other writing.¹² Thus, parol evidence is admissible to prove that a written commercial document was given through error.¹³ But in the absence of ambiguity oral

¹ Gallup v. Smith, 59 Conn. 354.

² Marrow v. Brinkley, 85 Va. 55.

³ Pitcher v. Gagan (Ky.), 15 S. W. Rep. 513.

⁴ Davis v. Davis, 108 N. C. 501.

⁵ Lorillard v. Clyde, 122 N. Y. 41.

⁶ Lazarus v. McGuirk, 42 La. Ann. 194.

⁷ Davis v. Sawyer (N. H.), 20 Atl. Rep. 100.

⁸ Larocque v. Harvey, 57 Hun, 336; 32 N. Y. State Rep. 415.

⁹ Hampton v. Dean, 4 Tex. 455; Parker v. Thompson, 3 Pick. (Mass.) 429.

¹⁰ Gage v. Gandy (Ill.), 30 N. E. Rep. 320.

¹¹ McDonald v. Hannah, 51 Fed. Rep. 78.

¹² Fudge v. Payne (Va.), 10 S. E. Rep. 7; Conlin v. Masecar, 80 Mich. 139; Davis v. Ely, 104 N. C. 16; Fox's Appeal, 141 Pa. St. 266.

¹³ Schwersenski v. Vineberg, 19 Can. Sup. Ct. 243; Nichols v. Scranton Steel Co., 64 Hun, 632; 46 N. Y. State Rep. 58; Sparks v. Brown, 46 Mo. App. 529.

evidence cannot be introduced to explain or vary a written instrument which is complete, although by mistake it does not express the contract which the parties intended to make.¹ Thus, although parol evidence is admissible to reform an instrument to make it express the intention and contract of the parties, it is inadmissible to prove a contemporaneous parol agreement which would impose restrictions, burdens and duties upon the other party to it inconsistent with the consideration expressed and the intention of the parties as expressed in the instrument itself.²

§ 27. Fraud — Parol evidence of.— Evidence of fraud in the making of a contract is not affected by the fact that the whole contract is expressed in writing.³ A written agreement may be modified, explained, reformed or set aside by parol evidence of fraud by one of the parties at the time of the execution of the writing, which induced the other party to sign it.⁴ Thus, proof of a parol agreement relating to lands is admissible to show fraud.⁵ So where the seller of a chattel fraudulently inserted in the contract a different quality or kind of chattel than that actually contracted for.⁶ But the fraud which will let in parol evidence to vary the terms of a written contract must be fraud in its procurement going to its validity, or some breach of confidence in using a paper delivered for one purpose by fraudulently perverting it to another.⁷ Thus, parol evidence of the declarations of a grantor prior to the deed is admissible to show fraud or estoppel.⁸ But in an action at law a party cannot show that an agreement or paper is good in part and void in part on the ground of fraud.⁹

§ 28. When written instrument may be contradicted.— Any person other than a party to a document or his repre-

¹ Van Horn v. Van Horn (N. J. Err. & App.), 49 N. J. Eq. 327.

² Alabama Midland R. Co. v. Brown (Ala.), 13 S. Rep. 70.

³ Scrogin v. Wood (Iowa), 54 N. W. Rep. 437.

⁴ Sidney School Furniture Co. v. Warsaw Tp. School District, 130 Pa. St. 76; Mayor v. Dean, 115 N. Y. 556; 26 N. Y. State Rep. 375; Stanhope v. Swafford (Iowa), 45 N. W. Rep. 403; State v. Cummings, 52 N. J. L. 77;

Sogory v. Bounge (La. Ann.), 9 S. Rep. 785; Bonds v. Smith, 106 N. C. 553.

⁵ Wainwright v. Talcott, 60 Conn. 43.

⁶ Kranich v. Sherwood, 92 Mich. 397.

⁷ Hukill v. Guffey, 37 W. Va. 425.

⁸ Valkenand v. Drum, 154 Pa. St. 616; Mattes v. Frankel, 47 N. Y. State Rep. 507.

⁹ Bigelow v. Wilson (Iowa), 54 N. W. Rep. 465.

sentative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove, and any party to any document or any representative in interest of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document.¹ Thus, the rule that parol evidence will not be received to vary, explain or control a written instrument is confined entirely to actions between the parties thereto, or their privies in interest. In actions between strangers thereto the real facts may be shown, or any fact that changes the legal effect of the contract or shows the real intention, object or purpose of the contract;² and this is the rule also in cases where the contract is offered in evidence in an action between a stranger to the contract and one of the parties thereto;³ nor does it apply in actions between sureties, as they are not regarded as estopped, by the provisions of the contract, from showing any agreement between themselves or the party for whom they became surety. The rule is confined exclusively to the parties actually contracting as principals.⁴ Therefore a written instrument may be contradicted by the party making it when offered in evidence in a suit to which a stranger is a party. In an action between third parties a grantor is a competent witness to impeach his own deed, under which one of them claims.⁵ As the rule as to varying or altering the terms of a written contract does not apply to any writing except a contract between the parties to the suit, a mere statement in writing of certain facts, not constituting a contract or inducing action by another, will not preclude parol evidence inconsistent therewith.⁶

¹ Dig. Law of Ev., art. 92; *Lowell Mfg. Co. v. Safeguard F. Ins. Co.*, 88 N. Y. 599; *Payne v. Crawford* (Ala.), 11 S. Rep. 725; *Leslie v. Leslie*, 50 N. J. Eq. 155; *Doctor v. Darling*, 52 N. Y. State Rep. 221; 68 Hun, 70.

² *Robinson v. Mosely*, 93 Ala. 70; *Clerihen v. West State Bank* (Minn.), 52 N. W. Rep. 967.

³ *Fox v. McComb*, 63 Hun, 633; 45 N. Y. State Rep. 754; *Barrida v. Silsbee*, 21 How. (U. S.) 146.

⁴ *National Car & L. Builder v. Cyclone Steam Snow Plow Co.*, 49 Minn. 125; *Thomas v. Truscott*, 53 Barb. 200; *Forbush v. Goodwin*, 25 N. H. 425.

⁵ *Reeves v. Brayton*, 36 S. C. 384.

⁶ *Beardsley v. Gaylord*, 65 Hun, 624; 48 N. Y. State Rep. 53; *Kreusberger v. Wingfield*, 96 Cal. 251; *Woolworth v. McPherson*, 55 Fed. Rep. 558; *Carpenter v. Scott* (Iowa), 53 N. W. Rep. 328.

CHAPTER XI.

BURDEN OF PROOF.

I. BURDEN OF PROOF.

- § 1. In general.
- 2. Illustrations.
- 3. Conditions, exceptions, waiver.
- 4. Sufficient evidence to go to jury

II. CIVIL DAMAGES.

III. PENALTIES.

IV. LIMITATIONS OF ACTIONS.

V. NEGLIGENCE.

- 5. In general.
- 6. Presumption of negligence.
- 7. Contributory negligence.
- 8. Master and servant.
- 9. Sleeping-car — Money on passengers.
- 10. Implied admissions of negligence.
- 11. Negligent or wrongful acts committed abroad.
- 12. Telegraph messages — *Prima facie* case — Notice.

VI. FRAUD.

- 13. Sufficiency of proof to carry case to jury.
- 14. Innocence — Presumption of in civil actions.
- 15. Preponderance of proof sufficient.
- 16. Continuous fraudulent transactions.
- 17. Fraud to do away with a written instrument.
- 18. Other frauds.

- § 19. Intent — When party may swear to it.

- 20. Fictitious consideration fraudulently made up.

- 21. Burden of proof on creditor to show fraud.

- 22. To set aside an assignment for creditors.

VII. CONVERSION, DEMAND.

VIII. DEFENSES.

- 23. Illustrations.

- 24. Illegality of contract.

- 25. Usury.

- 26. Constructive fraud — Burden of proof.

IX. PAYMENT.

X. ASSIGNMENT.

- 27. In general.

- 28. Presumed when.

- 29. Consideration of.

- 30. Gift.

- 31. Execution and delivery of.

- 32. By trustees, executors, etc

XI. CORPORATIONS AND CORPORATE EXISTENCE.

- 33. *De facto*.

- 34. Estoppel by and against.

- 35. Powers of corporations.

- 36. Contracts of.

- 37. Torts of.

- 38. Books and papers of.

XII. EXECUTORS AND ADMINISTRATORS.

- 39. Title.

- 40. Acts and declarations of representatives.

XIII. TESTIMONY OF INTERESTED WITNESSES AS TO TRANSACTIONS WITH DECEDENT.

§ 41. In general.

XIV. TO CHARGE NEXT OF KIN WITH ANCESTOR'S DEBT.

XV. ADVANCEMENTS.

XVI. WILLS.

42. Extrinsic evidence affecting.

XVII. ADEPTION AND LAPSING.

XVIII. CITIZENSHIP AND ALIENAGE.

43. In general.

XIX. DEATH — PROOF OF.

XX. MARRIAGE — PROOF OF.

XXI. ISSUE AND LEGITIMACY.

44. Issue.

45. Legitimacy.

XXII. HUSBAND AND WIFE.

§ 46. Title — Law of place.

47. Agency of one for the other.

48. Wife's title.

49. Actions by and against wife.

50. Actions by and against husband.

XXIII. PUBLIC OFFICERS.

51. Title to office — When strict proof of is necessary.

52. When strict proof of is not necessary.

XXIV. PARTNERS AND JOINT CONTRACTORS.

53. Joint contractors.

54. Partners — Proof of partnership.

55. Partners — How far liable.

56. Dissolution — Effect of.

I. OF BURDEN OF PROOF.

§ 1. In general.— Sir J. Stephen, in his Digest of the Law of Evidence,¹ states the general rule as to the burden of proof as follows: "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist must prove that those facts do or do not exist."² The burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings. As the proceeding goes on, the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor.³ The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any

¹ Art. 93, etc.

² 1 Ph. Ev. 552; T. E., § 337; Best, §§ 265, 266; Starkie, §§ 585, 586; 1 Greenl. Ev., § 74; 1 Whart. Ev., §§ 353-356; Costigan v. Mohawk &

H. R. R. Co., 2 Denio, 609, 616; Pusey v. Wright, 31 Pa. St. 387, 394.

³ 1 Ph. Ev. 552; T. E., §§ 338, 339; Starkie, §§ 586, 587, 748; Best, § 268; Railroad Co. v. Gladmon, 15 Wall. 401, 406.

law that the burden of proving that fact shall lie on any particular person;¹ but the burden may in the course of a case be shifted from one side to the other; and in considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.² The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.”

The burden of proof remains on a party affirming a fact in support of his case, and does not change in any aspect of the cause, while the weight of evidence shifts from side to side during the progress of the trial according to the nature of the strength of the proof offered in support or denial of the main fact to be established.³ Indeed, it is a well-founded rule of law, that, in a case where the testimony is so evenly balanced as not to admit of a conclusion being drawn from it, the verdict must be against the party upon whom the burden of proving the issue rests. In other words, the burden of proof remains where the issue made by the pleadings places it, and the party who, if no evidence is offered in a given issue, will be defeated as to that issue, is the one having the burden of proof in respect thereto;⁴ and a party must prove all the facts necessary to his right, except so far as they are admitted by the adverse party,⁵ as there can be no relief, without proof, on a controverted question.⁶ A defendant setting up matter in mitigation, or in justification, or in avoidance, or in bar, takes the burden of establishing fully those defenses;⁷ that is to say, the *onus probandi* rests upon the party who is obliged to free himself from liability by proving a fact, when the

¹ T. E., §§ 345, 346.

² *Clements v. Moore*, 6 Wall. 299, 315; *United States v. Hayward*, 2 Gall. 485, 497; *Great West. R. R. v. Bacon*, 80 Ill. 347, 352.

³ *Scott v. Wood*, 81 Cal. 398; *Meagley v. Hoyt*, 125 N. Y. 771; 36 N. Y. State Rep. 27.

⁴ *Blunt v. Barrett*, 35 N. Y. State

Rep. 64; 124 N. Y. 117; *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45.

⁵ *Henderson v. Carbondale Coal, etc. Co.*, 140 U. S. 25; *Litch v. Clinch*, 136 Ill. 410.

⁶ *Hughes v. Hughes*, 87 Ala. 652.

⁷ *Winans v. Winans*, 19 N. J. 220; *Gray v. Gardner*, 17 Mass. 188; *Murrell v. Whitney*, 32 Ala. 54; *Hopkins v. Kent*, 17 Md. 113.

knowledge of that fact is supposed to be more within his reach than that of his adversary.¹

§ 2. **Illustrations.**—(1) While a party is seeking to recover upon the ground that the defendant did not discharge a statutory duty, the burden is upon him to show that such duty was not performed.²

(2) In an action for slander it is not necessary for the plaintiff in the first instance to offer proof bearing directly upon his previous good character, or that the words, if uttered, were false;³ but he must show that the words, or substantially the same words, charged were uttered as charged.

(3) The plaintiff must prove the terms of an oral contract, where its terms are put in issue by the pleadings.⁴ And in every action for a breach of contract, the party alleging performance, where that allegation is denied, must prove by a fair preponderance of evidence that he has himself complied substantially with the terms of the agreement.⁵

(4) A person seeking to recover back money paid on an alleged void assessment has the burden of showing that the assessment was void.⁶

(5) The burden of proving delivery and acceptance of goods sold, so as to take the case out of the statute of frauds, rests upon the person setting up the contract.⁷ In an action at law against a mutual benefit insurance company for damages for refusing to make an assessment, the plaintiff assumes the burden of showing what the contract was worth, and what he would have derived from the assessment.⁸

§ 3. **Conditions, exceptions, waiver.**—Where the action is to recover on a contract by the terms of which an essential precedent act was to be performed by the plaintiff, he must prove a compliance on his part.⁹ Thus, if the validity

¹ *Selma R. & D. R. Co. v. United States*, 139 U. S. 560.

² *Silver v. Missouri P. R. Co. (Mo.)*, 13 S. W. Rep. 410.

³ *Broughton v. McGrew*, 39 Fed. Rep. 672.

⁴ *Hoffeditz v. Maiden Creek Iron Co.*, 141 Pa. St. 58; *Hull v. Cooper*, 36 Mo. App. 389; *Pendleton v. Cline*, 85 Cal. 142.

⁵ *Durrah v. Goa*, 77 Mich. 16;

Simons v. Ypsilanti Paper Co., id. 185.

⁶ *Remsen v. Wheeler*, 121 N. Y. 685; 31 N. Y. State Rep. 385.

⁷ *Harris P. S. Co. v. Fisher*, 81 Mich. 136.

⁸ *O'Brien v. Home Benefit Soc.*, 117 N. Y. 310; 27 N. Y. State Rep. 326.

⁹ *Craycroft v. Walker*, 26 Mo. App. 469.

of a deed depends upon an act *in pais*, the party claiming under it is bound to prove the performance of the act.¹ So in an action on a policy of insurance, the burden is on the plaintiff to show that the loss did not come within any of the exceptions in the policy.² If a waiver of condition is claimed by plaintiff the burden is on him to prove it;³ and one who invokes the protection of a proviso or exception to a general law must show himself clearly within its terms.⁴ To recover upon an agreement by defendant to pay when able, a change for the better in defendant's circumstances must be shown.⁵ So the burden of proving a compliance with a warranty on the part of the insured in a fire-insurance policy rests upon him.⁶ One who seeks to establish rights under a contract made by a trustee must show affirmatively that all conditions upon which the authority of the trustee to make the contract depends were strictly complied with.⁷

§ 4. **Sufficient evidence to go to the jury.**—It is not enough to authorize the submission of a question as one of fact to the jury that there is some evidence. A scintilla of evidence, or a mere surmise, that there may have been a wrong act on the part of the defendant will not justify a judge in leaving the case to the jury. Since the scintilla doctrine has been exploded both in England and in this country, the preliminary question of law for the court is, not whether there is literally no evidence or a scintilla, but whether there is any that ought reasonably to satisfy a jury that the fact sought to be proved is established. Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what was called a scintilla of evidence in support of a case, the judge

¹ *Deprutro v. Young*, 134 U. S. 241.

² *Pelican Fire Ins. Co. v. Troy Co-op. Ass'n*, 77 Tex. 225.

³ *Rechmuller v. Philadelphia F. Ass'n*, 38 Mo. App. 118.

⁴ *Paddock v. Balgord* (S. D.), 48

N. W. Rep. 840; *Serfass v. Driesbach*, 141 Pa. St. 142.

⁵ *Work v. Beach*, 59 Hun, 625; 37 N. Y. State Rep. 547.

⁶ *Rankins v. Amazon Ins. Co.*, 89 Cal. 203.

⁷ *Anderson v. Prairie School Tp.* (Ind. App.), 27 N. E. Rep. 439.

was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof rests.¹

II. DAMAGES FOR SALE OF LIQUOR.

(a) In an action under the Civil Damage Act, the plaintiff must show that the defendendant furnished liquor to the person intoxicated. But it may be shown that such person entered the defendant's place sober and came out intoxicated. The defendant may show that the person previously drank elsewhere. The witness may testify directly to the intoxicating quality of the beverage, or the court may take judicial notice of it; but where they do not do so there must be some evidence on the point, and the question is for the jury.²

(b) If the act requires proof of known intemperate habits, evidence of general reputation is not enough, at least without such circumstances of presumptive or of long-continued sales by defendant as to raise the presumption that he had notice of the habit.

(c) Intemperate habit is a question of fact, and witness may be allowed to state that the drunkard was of such habit.³

(d) Any witness, though he be not an expert, who saw the alleged drunkard, may be asked whether or not he was, in the witness' judgment, intoxicated or drunk, or under the influence of liquor.⁴

(e) It is essential to prove actual damage of the kind mentioned in the statute.⁵ Mere suffering and indignity are not alone sufficient to sustain an action.⁶ To establish this kind

¹ Dwight v. Germania L. Ins. Co., 103 N. Y. 358.

² Commonwealth v. Peckham, 2 Gray, 514; Markle v. Akron, 14 Ohio, 586; Warley v. Spurgeon, 38 Iowa, 465.

³ Stanley v. State, 26 Ala. 26; Adams v. State, 25 Ohio St. 585; Wickwire v. State, 19 Conn. 477.

⁴ People v. Elwood, 14 N. Y. 562; McKee v. Nelson, 4 Cow. 355; Woolheather v. Risley, 38 Iowa, 486; Brannon v. Adams, 76 Ill. 331.

⁵ Friese v. Krippe, 70 Ill. 496.

⁶ Peterson v. Knoble, 35 Wis. 80; Dunlavey v. Watson, 38 Iowa, 398.

of recovery, dependence for support in some degree at least must be shown. Means of support in the statute includes the wages or produce of labor, as well as moneys and goods. Upon this point the plaintiff may give evidence of the general condition and circumstances of the husband or parent, and of his habits of sobriety, and capacity to earn or produce.¹

(f) To recover exemplary damages there must be evidence not only of actual damage, but of conduct wilful, wanton, reckless, or otherwise deserving of condemnation, beyond mere actual damage.²

III. PENALTIES.

(1) The condition upon which a penalty attaches must be affirmatively shown to have existed. Under an allegation that the defendant did the act, evidence that he caused or procured it to be done is competent.³ Knowledge of the law is not presumed as a matter of fact.⁴ If a notice be required by the statute as preliminary to the penalty, it must be directly proved. But if it is not the foundation of the action, and merely relates to some collateral fact, its contents may be proved by parol.⁵

(2) If the statute forbids the doing of the act knowingly, evidence of the habitual or repeated act is presumptive of knowledge. Similar violations being committed during the same period in the same business or premises are competent and *prima facie* evidence of intent.

(3) In the case of several defendants, the admissions and declarations of one are competent against himself, but not necessarily against the others. Where parties are sued under liquor laws, evidence of keeping for sale is competent on the question of sale. So is the fact of keeping a bar, with bottles in it; and the fact that it was a place of resort; that persons went in sober and came out drunk. Evidence of the moving of liquor casks and of having empty vessels which recently contained intoxicating liquors is competent.

¹ Dunlavey v. Watson, 38 Iowa, 398. Commissioners of Pilots v. Vanderbilt, 31 N. Y. 265.

² Kreiter v. Nichols, 28 Mich. 500; ⁴ Black v. Ward, 27 Mich. 191.

Bates v. Davis, 76 Ill. 222.

⁵ McFadden v. Kingsbury, 11 Wend.

³ Gaffney v. Colvill, 6, Hill, 567; 667.

(4) Any ordinary witness may testify directly that liquor was gin, brandy, beer or whisky. It does not require an expert.¹ Evidence of the precise day of committing the offense is not essential.²

(5) Sales or seizures made the third day prior to the day pleaded are competent evidence tending to prove that the keeping on the day named was with intent to sell.³ Where the statute applies to sales or gifts, either the sale or gift may be proved under the allegation that the defendant sold or gave.⁴

(6) Proof that the drunkard wrongfully took the liquor, and the defendant, on discovering the tort, compelled him to pay for it, does not establish a sale.⁵ Under an allegation that the defendant sold, it is competent to prove sales by his subordinate.⁶

(7) Evidence that the salesman was in the place and garb of clerk, servant, son, husband or wife of the defendant is competent, but not alone sufficient to show his agency.⁷

(8) It is competent to prove that defendant's name was on a sign-board on or in the bar-room, or the license or the application for it, or the label bearing the defendant's name, checks, etc., were found in the place.⁸

IV. LIMITATION OF ACTIONS.

(a) Where the statute of limitation is pleaded, the plaintiff, or, where the statute is pleaded to a counter-claim, the defendant, must show any suspension of the statute which he claims;⁹ the commencement of action within the time allowed by law,¹⁰ or that the cause of action came within an exception to the general rule of the statute — as that the plaintiff was under a disability at the time the cause of action accrued,¹¹ or that the debtor was out of the state, or a new promise.¹² If the new

¹ Commonwealth v. Timothy, 8 Gray, 480.

² Tiffany v. Griggs, 13 Johns. 253.

³ Commonwealth v. Stoeher, 109 Mass. 365.

⁴ State v. Brown, 36 Vt. 560.

⁵ Kreiter v. Nichols, 28 Mich. 496.

⁶ Parker v. State, 4 Ohio St. 563.

⁷ State v. Brown, 31 Me. 520; Mead v. Stratton, 8 Hun, 148.

⁸ Com. v. Dearborn, 109 Mass. 368.

⁹ Baldwin v. Martin, 14 Abb. Pr. (N. S.) 9.

¹⁰ 2 Greenl. Ev., § 431.

¹¹ Ford v. Babcock, 2 Sandf. 518; Angell on Lim., § 196.

¹² Wakeman v. Sherman, 9 N. Y. 85; Kincaid v. Archibald, 73 id. 189.

promise was to pay when able, the ability to pay must be shown.¹

(b) Part payment must be an actual transfer of something of value, and evidence of mere payment of money only is not enough without something to show that the debtor intended to recognize the debt as subsisting, and that he was willing to pay it.²

(c) An indorsement of payment on the instrument sued on, if in the handwriting of the defendant or of the creditor shown to have since deceased, if there is extrinsic evidence of the date,³ or where it appears that the indorsement was made when its operation would be against the interest of the party making it, is competent and sufficient to go to the jury.⁴

(d) An indorsement or memorandum of a payment made upon a promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment was made, is not sufficient proof of such payment to take the case out of the statute of limitation, unless it be satisfactorily shown that it was thus made before the statutory period had elapsed, in which case it is regarded as a declaration against the proprietary interest of the declarant. The date of such indorsement must be shown by independent evidence.

V. NEGLIGENCE.

§ 5. *In general.*—As a general rule, negligence is an affirmative fact to be established by him who alleges it as a foundation of his right of recovery. It is incumbent upon the plaintiff to point out by evidence the defendant's fault, for the presumption is, until the contrary appears, that every man has performed his duty. Therefore, in an action for negligence the plaintiff must prove that facts from which it can be legitimately inferred that either in construction, repair or operation the defendant omitted that reasonable care and caution which he should have observed. It is necessary to recognize a distinction, which has been carefully guarded by the courts, between actions founded in negligence, when a

¹ *Wakeman v. Sherman*, 9 N. Y. 85; *Carrington v. Crocker*, 37 id. 336; *Lonsdale v. Brown*, 4 Wash. C. C. 86; *Harper v. Fairley*, 53 id. 442.

Carlledge v. West, 2 Denio, 377.

³ *Risley v. Wightman*, 13 Hun, 163.

² *Blanchard v. Blanchard*, 122 Mass. 558; *Smith v. Ryan*, 66 N. Y. 352; 182.

⁴ *Roseboom v. Billington*, 17 Johns.

contract relation existed between the parties, and those in which the defendant owed no other duty than to use such ordinary care and caution as the nature of his business demanded to avoid injury to others. Thus, where the owner of land expressly or by implication invites others to come upon his premises, if he permits anything in the nature of a snare to exist thereon, he is responsible for an injury resulting therefrom to one availing himself of the invitation. But if he gives a bare permission to cross the premises, the licensee takes the risk of accidents in using the premises in the condition in which they are. In both cases the act is the same; but in the one case he owes a duty not to maintain a snare, in the other not. In view of the relations of the parties he is held to be negligent in the first case but not in the second. Sometimes, it is true, the duty which the defendant owes to the plaintiff is of such a nature that proof of the happening of the accident under certain circumstances and given conditions will be of such legal value as to afford presumptive evidence of negligence, and cast upon the defendant the burden of explanation. This rule has been applied to the carrier of passengers, especially in conveyances propelled by steam, where the consequences of an accident are frequently fatal to human life, and the public interests require that in such cases the carrier shall use every precaution which human skill and foresight can provide to prevent accident and its results. Even in those cases there must be reasonable evidence of negligence before a defendant can be called upon to relieve itself from the presumption of negligence. When the thing causing the injury is shown to be under the control of a defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, it does, in absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care. It is never true in contractual relations that proof of the mere fact that the accident happened to the plaintiff, without more, will amount to *prima facie* proof of negligence on the part of the defendant. The cases in which the rule *res ipso loquitur* has been enforced against defendants are nearly all passenger cases.¹

¹ Mullen v. St. John, 57 N. Y. 567, The Standard Oil Co., 123 N. Y. 118; is an exception; Cosulich et al. v. 33 N. Y. State Rep. 287.

§ 6. **Presumption of negligence.**— Whenever a car or train leaves the track it proves that either the track or machinery or some portion thereof is not in proper condition, or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in proper condition and operate it with necessary prudence and care, has in some respects violated his duty. While in an action against a party for negligence, the burden of proof of showing negligence of the defendant, occasioning an injury, rests, in the first instance, upon plaintiff, proof that the injury was the result of an accident which would not ordinarily have happened had everything been in proper condition and operated with proper care is sufficient, and the *onus* then rests upon the defendant to prove that the injury was caused without fault. There is no rule applicable to the trial of issues of fact in civil actions, unless the issue involves the commission of a crime by some of the parties thereto, which requires a party upon whom the burden of proof rests to establish a case free from reasonable doubt. It was held in the case of *Johnson v. Agricultural Ins. Co.*,¹ where the defendant had, in answer to an action upon a policy of insurance to recover damages for a loss occasioned by fire, alleged that the plaintiff had himself fired the insured buildings, that it was sufficient if the defense was supported by a preponderance of evidence, and that it was error to require the defense to be proved beyond a reasonable doubt. The question decided in that case has been the subject of considerable controversy among authors upon evidence, and we do not intend to express any opinion thereon; but we apprehend that the case suggested presents the only exception, if any exists, to the rule that upon the trial of a civil action the party sustaining the burden of proof performs his obligation by presenting a preponderance of evidence.²

§ 7. **Contributory negligence.**— In New York, Massachusetts and Texas, a plaintiff in an action for personal injuries has the burden of proving not only that the accident was the result of the defendant's negligence, but that the plaintiff was

¹ 25 Hun, 251.

N. Y., L. E. & W. R. Co., 95 N. Y.

² 3 Greenl. Ev., § 29; Seybolt v. 562.

free from contributory negligence.¹ There seems to be a different rule where a passenger is injured while being carried in a vehicle of a common carrier.² In Wisconsin, Georgia, Missouri, Alabama, Minnesota, Pennsylvania and in the United States courts, the rule is that contributory negligence, when not disclosed by the complaint or testimony on the part of the plaintiff, is purely a matter of defense.³ But the rule seems to be different in regard to damage to property; thus, a libelant for collision has the burden of showing the libeled vessel to be in fault, and freedom from fault on the part of his own vessel.⁴

§ 8. **Master and servant.**— Upon the question whether or not the method adopted by a foreman of doing work, which resulted in the injury of an employee, was negligent, other men experienced in doing such work may describe to the jury what other and safer methods, if any, might have been adopted in doing it.⁵ A minor suing for personal injuries suffered in his employment upon a railroad may testify that no one explained to him the danger of the employment.⁶ The rules of a railroad company are competent and relevant in an action between the company and one of its employees for an injury caused by a violation of one of such rules.⁷ So is any order of the company shown to have come to the knowledge of an injured employee.⁸ It is competent to show that no signal was given of the presence on the track of a belated local freight train, where another train is ordered to proceed with-

¹ *Winterfeld v. Second Ave. R. Co.*, 66 Hun, 627; 49 N. Y. State Rep. 435; *Barton v. Kirk*, 157 Mass. 303; *Gulf Coast & S. F. R. Co. v. Riordan* (Tex.), 22 S. W. Rep. 519.

² *Bush v. Barnett*, 96 Cal. 202; *Payne v. Halstead*, 44 Ill. App. 97; *Fordice v. Withers*, 1 Tex. Civ. App. 540; *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 86; 20 L. R. A. 316.

³ *Welsh v. Argyle* (Wis.), 55 N. W. Rep. 412; *Augusta v. Hudson*, 88 Ga. 599; *Churchman v. Kansas City*, 49 Mo. App. 366; *Bromley v. Birmingham M. R. Co.* (Ala.), 11 S. Rep. 341;

Washington & G. R. Co. v. Tobriner, 147 U. S. 571; *Baker v. North East*, 151 Pa. St. 234.

⁴ *The Charles L. Jeffery*, 55 Fed. Rep. 685; *The Wioma*, id. 338; *The St. John*, 54 id. 1015.

⁵ *Fogus v. Chicago & A. R. Co.*, 50 Mo. App. 250; *Chopin v. Badger Paper Co.*, 83 Wis. 193.

⁶ *Texas & P. R. Co. v. Brick*, 83 Tex. 598.

⁷ *Chattanooga R. & C. R. Co. v. Whitehead*, 90 Ga. 47.

⁸ *Price v. Richmond & D. R. Co.*, 38 S. C. 117.

out giving any notice or warning of any danger ahead.¹ That no signal or warning was given of the sudden backing of a car on a railroad track where members of a gang of laborers were liable to be standing while lawfully unloading cars for the consignee of freight is admissible as part of the *res gestæ*, as bearing on the railway company's alleged negligence.²

§ 9. **Sleeping-car — Money on passengers.**— A traveler who pays for a berth is invited and has a right to sleep; and both parties to the contract know that he is to become powerless to defend his property from thieves or his person from insult, and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed. Money in a passenger's clothing worn during the day and placed under his pillow at night is not in the custody of the corporation which carries and furnishes travelers with berths in sleeping coaches so as to make it liable for its loss. To sustain a recovery some evidence of negligence on the part of the carrier must be given. Proof that a car ran over an important route between great thoroughfares and stopping at considerable cities, that but one person was employed on the car as conductor, porter and bootblack, is sufficient to put the carrier to proof of the care which it took of the occupants of the sleeper on the trip, and is sufficient to require the question, whether the loss was caused by the defendant's negligence, to be submitted to the jury.³

§ 10. **Implied admissions of negligence.**— Evidence of the subsequent discharge of employees or changes in appliances, or the addition of entirely new apparatus or subsequent changes and repairs, by a party charged with negligence, is inadmissible as an implied admission of such negligence.⁴

§ 11. **Negligent or wrongful acts committed abroad.**— Circumstances give rise to presumptions, and these in turn are proof;⁵ and a party on whom the burden of proof rests

¹ *Chattanooga R. & C. R. Co. v. Hager v. Southern P. Co.* (Cal.), 33 Pac. Rep. 119; *Christensen v. Union Owen*, 90 Ga. 265.

² *Spotts v. Wabash W. R. Co.*, 111 Mo. 380. *Trunk Line (Wash.)*, 32 Pac. Rep. 1018; *Bowles v. Kansas City*, 51 Mo. App.

³ *Carpenter v. N. Y., N. H. & H. R. R. Co.*, 124 N. Y. 53; 34 N. Y. State Rep. 857. ⁵ *White v. Benjamin*, 23 N. Y. Supp. 981.

⁴ *Downey v. Sawyer*, 157 Mass. 418;

is entitled to the aid of all legal presumptions arising out of the facts established. It will be presumed that the common law of a state is the same as that where the court is sitting, in those states the jurisprudence of which was founded upon or derived from the common law.¹ And in the absence of proof, the jurisprudence of all the states will be presumed to have been founded upon the common law.² But the rule is different in those states the jurisprudence of which was not founded on the common law. The actionable quality of an alleged wrong depends upon and is determined by the municipal law of the place of the transaction; and in a suit in one state for an alleged wrong committed in another state or a foreign country, the court, in the absence of evidence to the contrary, will presume the common law to be the law of the locality; and if by the principles of the common law such alleged wrong is not the subject of an action for private redress, the plaintiff, in order to recover, must prove it to be so by the law of the place of the transaction.³ Thus, actions for injuries to the person in another state are sustained without proof of the *lex loci* because they are permitted by the common law, which is presumed to exist in the foreign state; but such presumption does not arise where the right of action depends upon a statute which confers it; and in the latter case the action can only be maintained by proof that the statutes of the state or country in which the injury occurred give the right of action, and are similar to that of the forum.⁴ The two statutes need not be identical in their terms, or precisely alike, but it is enough if they are of similar import and character, founded upon the same principles, and possessing the same general attributes.⁵ The territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands belonging to the same state. The general usage of nations superadds to this

¹ Alabama G. S. R. Co. v. Carroll, 53 Am. & Eng. Ry. Cas. 556. Pac. Rep. 246; Knapp v. Knapp, 95 Mich. 474.

² Haggin v. Haggin, 35 Neb. 375; Brown v. Wright (Ark.), 22 S. W. Rep. 1022; Burhans v. Western U. Tel. Co. (Ind. App.), 34 N. E. Rep. 546. ³ Geoghegan v. Atlas Steamship Co., 51 N. Y. State Rep. 868.

⁴ McDonald v. Mallory, 77 N. Y. 581; American Oak Leather Co. v. Standard Gig Saddle Co. (Utah), 33 N. Y. 53. ⁵ Leonard v. Columbia S. N. Co., 84 N. Y. 53.

extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore, all along the coast of the state. Within these limits its rights of property and territorial jurisdiction are absolute and exclude those of every other nation.¹ It is the law of civilized nations that when a merchant of one country enters the port of another for the purpose of trade it subjects itself to the law of the place to which it goes.

§ 12. **Telegraph messages — Prima facie case — Notice.** In actions against telegraph companies for failing to accurately or promptly deliver communications, a plaintiff makes out a *prima facie* case by proving the contract and its breach, and he need not go further and give evidence of some negligent act of omission or commission on the part of the company or of its agents.² While a telegraph company is not, unless it so expressly contracts, held to warrant or insure the accurate transmission or prompt delivery of messages, it cannot by notice limit its liability for negligence by a printed blank containing such notice.³

VI. FRAUD.

§ 13. **Sufficiency of proof to carry case to jury.**—Fraud is a question of fact and should generally be submitted to the jury. But it should be submitted to them upon competent and sufficient proof. When there is no evidence to justify a finding of fraud, the question is not for the jury but for the court, and a nonsuit or the direction of a verdict is proper. An intent to defraud cannot be imputed to a purchaser of property on credit merely from the fact that he was to his knowledge insolvent at the time of the purchase, and that he omitted to disclose such condition to his vendor. These must be accompanied by facts disclosing an intent to acquire the property without paying for it. The intention not to pay can no more be inferred from the mere fact of insolvency than the fact of insolvency can be inferred from the existence of an intention not to pay. A party seeking to establish a cause of action

¹ *Manchester v. Massachusetts*, 139 U. S. 240. *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; Gray, Tel., §§ 26, 53, 54, 77.

² *Rittenhouse v. Independent Line* ³ *Pearsall v. Western U. T. Co.*, 124 of *Tele.*, 1 *Daly*, 474; 44 N. Y. 263; N. Y. 256; 35 N. Y. State Rep. 307.

against another based upon an alleged fraud must show affirmatively facts and circumstances necessarily tending to establish a probability of guilt. If the evidence is capable of an interpretation equally consistent with innocence as with guilt, the former meaning must be given to it.¹ When a litigant bases his cause of action upon the fraudulent conduct of the opposite party, he must be presumed to be aware of the frauds from which he suffers, and it is no hardship to require them to be stated with reasonable precision.²

§ 14. Innocence — Presumption of in civil actions.— The presumption of innocence arises on the trial of civil cases, when the grounds of recovery or defense involve and charge the commission of a crime;³ but it is not so in case of conversion, trover, negligence, replevin and similar actions *ex delicto*.⁴

§ 15. Preponderance of proof sufficient.— There is no rule of law which requires the plaintiff, in a civil action, when a judgment against the defendant may establish his guilt of a crime, to prove his case with the same certainty which is required in criminal prosecutions. Nothing more is required in such cases than a just preponderance of evidence, always giving the defendant the benefit of the presumption of innocence.⁵ And there is no apparent reason for making any distinction in that respect in behalf of a defendant in an action for a penalty in which the people are the party plaintiff.⁶

§ 16. Continuous fraudulent transactions.— Where the transaction the thing done, the fact put in issue, is a fraud, which is not a simple but a compound and continuous fact, proceeding to its result by consecutive steps and separate acts, having necessarily an origin, a progress and an ultimate result, such fraud can be studied and proved all along the line, and in all its stages from origin to culmination, as forming part of the issue.⁷

¹ Morris v. Talcott, 96 N. Y. 107; People's Bank v. Bogart, 81 id. 101; Shultz v. Hoagland, 85 id. 464.

⁵ Sprague v. Dodge, 95 Am. Dec. 525.

² Reade v. Clark's Cove Guano Co., 47 Hun, 410; 14 N. Y. State Rep. 561.

⁶ People v. Briggs, 114 N. Y. 56; 22 N. Y. State Rep. 317.

³ Stevenson v. Gunning, 64 Vt. 601; Nye v. Lothrop, 94 Mich. 411.

⁷ Smith v. The National Benefit Society, etc., 123 N. Y. 85; 33 N. Y. State Rep. 67.

⁴ Bonnelly v. Bowen, 70 Miss. 142.

§ 17. Fraud to do away with a written agreement.— Although the contract of a sale of goods by sample is in writing, and contains no warranty, evidence of fraudulent representations as to their character and quality, made upon the sale, which were intended to and did cause the vendee to omit examination, are admissible under an answer setting up fraud.¹

§ 18. Other frauds.— To establish fraud in a given transaction, evidence is admissible of the commission of similar frauds in like transactions with other persons at or about the same time.² And a statement to a commercial agency, made the basis of a purchase from other parties, is admissible in an action of replevin upon rescission of a sale for fraud, as a contemporaneous act of fraud, where the sale was contemporaneous with that in question.³ On an issue as to whether a mortgage was fraudulent, other transfers by the debtor of his property are competent.⁴

§ 19. Intent — When party may swear to it.— The motive of a witness in performing an act can only be given in evidence when there is no other method of proving it. Thus, in an action against a railroad company for damages to premises caused by smoke, dust, noise, etc., a witness cannot be allowed to state whether or not he, as a tenant of the premises, removed therefrom on account of the effect produced by the operation of the road.⁵ But the general rule seems to be that the motive with which an act was done or words uttered, or an instrument was executed, may be inquired into by asking the party perpetrating the act, uttering the words or executing the instrument, and the real motive may be stated as a fact to be considered in connection with the other evidence. In other words, when the doing of an act is not disputed but is affirmed, and whether the act shall be held valid or invalid hangs upon the intent with which it was done, which intent from its nature would be held and formed without avowal, then

¹ *Mayer v. Dean et al.*, 115 N. Y. 556; 26 N. Y. State Rep. 375.

² *Continental Insurance Co. v. Insurance Co. of Pa.*, 51 Fed. Rep. 884; *Kelley v. Owens* (Cal.), 30 Pac. Rep. 596.

³ *Bliss v. Sickles*, 66 Hun, 633; 50 N. Y. State Rep. 139.

⁴ *Kellogg v. Clyne*, 54 Fed. Rep. 696; *O'Donnell v. Hall*, 157 Mass. 463.

⁵ *Moore v. New York El. Co.*, 130 N. Y. 523; 29 N. Y. State Rep. 432.

he upon whom the intent is charged may testify whether he secretly held such intent when he did the act.¹ If an act is in and of itself illegal, the offender's intent is immaterial; but if its character depends upon the intent with which it is done, then proof of the intent by the person who did the act in question is admissible.² Thus in a criminal case, when it is proved that the defendant has committed some act, and the motive with which it was done is material, he may testify in regard to his motive and may prove facts by others tending to show his intent.³ And when evidence tending to show a guilty motive on the part of the accused has been given, he has a right to give evidence to prove a different motive and repel the imputation.⁴ In an action to set aside an assignment for the benefit of creditors, the intent of the assignee in accepting the assignment is not material, as he is not a purchaser for value.⁵ In *Lalley v. Emery*,⁶ in an action for slander, when the answer admitted that the defendant used the words alleged in the complaint, it was held that he might testify that in the use of the words he did not intend to charge the plaintiff with the commission of the crime of rape. So in *Bennett v. Smith*⁷ it was held that a defendant was entitled to testify why he wrote the libel with which he was charged. While intent is to be judged of usually by the light of surrounding facts and circumstances which all can know and consider as well as the witness, a party must be allowed to testify as a witness in his own behalf that he did not intend to cheat, deceive or defraud, or to practice any fraud or deceit in the transaction wherein he was charged with having had such motive, however inconclusive, unsatisfactory or inconsistent his evidence may be. Thus, a person may be asked why he did not do a certain thing, when an answer would show the good faith of the party and the motive actuating the other party.⁸

¹ *Bayless v. Cockcraft*, 81 N. Y. 371.

⁵ *Kennedy v. Wood*, 52 Hun, 46;

² *McCormack v. Perry*, 47 Hun, 71;
14 N. Y. State Rep. 157; *Bennett v.*
Smith, 23 Hun, 50; *McKown v. Hun-*
ter, 30 N. Y. 625.

23 N. Y. State Rep. 132.

⁶ 59 Hun, 237; 28 N. Y. State Rep.
127.

⁷ 23 Hun, 50.

³ *Kerrains v. People*, 60 N. Y. 221.

⁸ *McCarthy v. Gallagher*, 53 N. Y.

⁴ *People v. Gardiner*, 57 N. Y. State
Rep. 18 (1893). State Rep. 176.

§ 20. Fictitious consideration fraudulently made up.—

The acts and transfers of a grantor pertinent to the question of his intent are admissible against a defendant grantee in an action to establish the intent of the grantor. It is not necessary that the same facts offered in evidence should tend to establish the intent of both. When a part of the consideration for a transfer of real estate is fictitious, and it was made by the grantor with a fraudulent intent, to which the grantee was a party, the conveyance cannot be sustained to the extent of the adequate and honest part of the consideration; but the deed is wholly void, and cannot stand to any extent as security or indemnity.¹

§ 21. Burden of proof on creditor to show fraud.—The owner of property can make a voluntary settlement thereof upon his wife or any one else without consideration, provided he has ample property left to satisfy all the just claims of his creditors. If the grantor remains solvent after the conveyance, and has sufficient property left to satisfy all his just debts, then the conveyance, whatever his intention was, cannot be a fraud upon his existing creditors; and when a judgment creditor assails a conveyance made by the judgment debtor, he cannot cast upon the grantee the *onus* of showing good faith, and of establishing that the grantor was solvent after the conveyance, by simply showing that the conveyance was not founded upon a valuable consideration. But the person assailing the conveyance assumes the burden of showing that it was executed in bad faith, and that it left the grantor insolvent, and without ample property to pay his existing debts and liabilities.² The character of a transaction is to be determined by the circumstances surrounding the parties at the time it took place. The validity of a conveyance does not depend upon subsequent events. The question in such cases is the financial condition of the grantor at the time; for if then solvent, his subsequent insolvency will not invalidate the conveyance.³

¹ Baldwin v. Short et al., 125 N. Y. Loehr, 79 id. 432; Bank v. Mead, 92 553; 36 N. Y. State Rep. 138. N. Y. 637.

² Pence v. Croan, 51 Ind. 338; Sherman v. Hoagland, 54 id. 578; White-³ Kain v. Larkin et al., 131 N. Y. 300; 43 N. Y. State Rep. 197.
sel v. Hiney, 62 id. 168; McCole v.

§ 22. To set aside an assignment for creditors.—In an action against a person to have his assignment for benefit of creditors declared fraudulent and void, it is competent upon the question of intent to prove the nature and character of his business transactions during a period of several months before and down to the time of the assignment; the use he made of the avails of his property immediately preceding the assignment; the negotiations he had with his creditors relative to the payment or securing the payment of the same; the representations which he made, if any, to induce his creditors not to press the collection of their debts, and the statements which he may have made to them during such negotiations as to his solvency.¹

VII. CONVERSION, DEMAND.

A *bona fide* purchaser of personal property, wrongfully taken from the possession of the owner, is not liable for conversion until after demand and refusal.² Where words are relied upon to constitute a conversion, they must be uttered in proximity to the property, under such circumstances as to show a determination to exercise dominion and control over it, and a defiance of the owner's right.³

VIII. DEFENSES.

The party holding the affirmative of the issue, as a general rule, takes the *onus* of proof; but there are numerous exceptions to this rule; and where the right of action depends upon a negative averment, the party making it is charged with the burden of proving it. In many cases only slight proof of the affirmative of the issue is necessary to throw the burden of proving the negative upon the defendant. These are instances where the law presumes the affirmative of the issue.

§ 23. Illustrations.—(1) The burden of proof is upon the defendant to show an affirmative defense. Thus, the defendant has the burden of proof of a defense that he is a *bona fide* purchaser for value.⁴

¹ First Nat. Bank, etc. v. Warner et al., 55 Hun, 120; 28 N. Y. State Rep. 450.

² Ely v. Ehle, 3 N. Y. 506.

³ Gillet v. Roberts, 57 N. Y. 28.

⁴ Redewill v. Gillen, 4 N. M. 78.

(2) The burden of proof is on the defendant, in an action on a policy of insurance, to prove the facts alleged in avoidance of it.¹

(3) A party pleading a forfeiture must prove it in every respect.²

(4) Proof that plaintiff's intestate was killed by the falling of an unsafe wall of a building leased to a certain corporation, but sublet, with his acquiescence, by the agents of another corporation, imposes upon the former corporation the burden of showing the relations between the two companies, in order to relieve itself of responsibility for the accident.³

(5) Where warranties have been qualified by a statement in the application that the facts are true as far as known to the applicant, the defendant must show knowledge.⁴

(6) Where defendant alleges a mistake he must prove it.⁵

(7) Where defendant claims an exemption from a *prima facie* liability he must prove it.⁶

(8) An intermediate carrier, as well as the last one of connecting carriers, has the burden of showing that the goods which were lost or injured before reaching the destination were not delivered to it in the same condition that they were in at the beginning of the trip.⁷ This is upon the rule that in all cases where the nature of the allegations is such as to show that the defendant is peculiarly possessed of the knowledge

¹ *Ætna Life Ins. Co. v. Ward*, 140 U. S. 76; *Flynn v. Massachusetts Ben. Ass'n*, 152 Mass. 288; *Scheuffer v. Grand Lodge A. O. U. W. (Minn.)*, 20 Ins. L. J. 241; *Metropolitan S. F. Acc. Ass'n v. Windover (Ill.)*, 27 N. E. Rep. 538; *Traveler's Ins. Co. v. Murray*, 16 Colo. 296.

² *Demings v. Supreme Lodge K. of P.*, 60 Hun, 350; 38 N. Y. State Rep. 979; 14 N. Y. Supp. 824; *Dickinson v. Leominster Sav. Bank*, 152 Mass. 49.

³ *Timlin v. Standard Oil Co.*, 126 N. Y. 514; 37 N. Y. State Rep. 906. And see *Blunt v. Barrett*, 35 N. Y. State Rep. 64; 124 N. Y. 117; *Wheelwright v. Walsh*, 42 Fed. Rep. 862.

⁴ *Waterbury v. Dakota F. & M.*

Ins. Co. (Dak.), 40 Alb. L. J. 513. And see *Manning v. Maroney*, 87 Ala. 563; 13 Am. St. Rep. 67.

⁵ *Teall v. Consolidated Electric Light Co.*, 119 N. Y. 654; 30 N. Y. State Rep. 117; *Fitschen v. Thomas*, 9 Mont. 52; *Dufford v. Smith*, 46 N. J. Eq. 216.

⁶ *Reinhardt v. Mentasti (Eng. Ch. Div.)*, 61 L. T. Rep. (N. S.) 328; 40 Alb. L. J. 490; *Gulf Coast & San Francisco R. Co. v. Hudson*, 77 Tex. 494; *Crenshaw v. Bradley*, 52 Ark. 318; *Whitely v. Clark*, 29 Ill. App. 36; *Benson v. Morgan*, 26 id. 22; *Wickham v. Terhune*, 54 Hun, 639; 28 N. Y. State Rep. 350.

⁷ *Savannah F. & W. R. Co. v. Harris*, 42 Am. & Eng. R. Cas. 457.

to disprove the issue, the law presumes the truth of the negative allegations, and the burden is upon the defendant to disprove them. But the rule never attaches, except in instances where the law presumes the truth of the allegations, until the contrary is shown.¹

(9) In an action for breach of contract of hiring, the burden of proving that other work was or could have been obtained by the employee is upon the employer.²

(10) In an action for selling articles without a license the burden is upon the defendant to show that he has complied with the law and has a license to sell.³

(11) The presumption is that liquor is intoxicating, and the defendant who is sued for selling intoxicating liquors assumes the burden to remove the presumption of law.⁴ So the presumption is that the neglect or refusal of a husband to support his wife is unlawful, and the burden is on him, when charged therewith, to prove its lawfulness.⁵

(12) The burden of proof as to a distinct defense in a criminal prosecution is on the defendant, as an *alibi*.⁶ But the burden of proof in a criminal case never shifts when the defendant relies on no distinct, independent fact — such as insanity — but confines his defense to the original transaction on which the charge is founded.⁷

(13) After proof of an intentional killing with a deadly weapon, the burden rests upon the defendant to prove a necessity for the killing in self-defense, unless such fact arises out of the evidence produced against him.⁸

(14) The burden of showing a release of a cause of action, or a party from liability;⁹ or the statute of limitation;¹⁰ or a

¹ Sheldon v. Clark, 1 Johns. 513.

² Brown v. Carlyle B. of E., 29 Ill. App. 572.

³ Com. v. Holstine, 132 Pa. St. 357; Williams v. People, 121 Ill. 84; People v. Fulda, 53 Hun, 65; 23 N. Y. State Rep. 418.

⁴ State v. Schaffer (Kan.), 24 Pac. Rep. 92.

⁵ State v. Schweitzer, 57 Conn. 532.

⁶ Rudy v. Com., 128 Pa. St. 500; State v. Howell, 100 Mo. 628.

⁷ People v. Ribalsi (Cal.), 26 Pac. Rep. 1082; People v. Travers, 88 Cal. 233.

⁸ Gibson v. State, 89 Ala. 121.

⁹ The American Eagle, 54 Fed. Rep. 1010; Kortlander v. Elston, 52 id. 180; Brooks v. Rodgers (Ala.), 13 S. Rep. 386.

¹⁰ Kilbourne v. Sullivan County, 137 N. Y. 170; 50 N. Y. State Rep.

376.

discharge by transfer of the cause of action;¹ or mistake or fraud in making the contract sued upon;² or a rescission, or accord and satisfaction;³ or that a lease sued on was surrendered;⁴ or that a contract is *ultra vires*,⁵ or unreasonable,⁶ or usurious;⁷ or a breach of warranty,⁸ — is with the party alleging it.

(15) In a suit for infringement of a patent the defendant has the burden of proving prior use, sale and exposure.⁹

(16) In an action upon an insurance policy the burden is on the insurer to prove breach of conditions, exceptions, fraud, etc., set up by it;¹⁰ self-defense;¹¹ consent of owner or occupant of building entered;¹² or, in a prosecution for rape, that the defendant was under the age of fourteen years.¹³

(17) The defendant in a criminal action has the burden of establishing his plea of insanity to such an extent as to create a reasonable doubt,¹⁴ or by a preponderance of testimony.¹⁵

§ 24. **Illegality of contract.**—As a general rule illegality to be admissible must be pleaded. It is never presumed. Oral evidence is admissible to show illegal intent, though it contradict the terms of the written instrument. The presumption is that the law is known abroad as well as within this state, but not to persons not citizens of this state. Where

¹ Potter v. Ogden, 49 N. Y. State Rep. 829; 136 N. Y. 384.

² Hay v. Robinson (Oreg.), 31 Pac. Rep. 63; Ervin v. Brooks, 111 N. C. 358; Yosemite Com'rs v. Barnard (Cal.), 32 Pac. Rep. 982.

³ Chapin v. Pratt, 66 Hun, 628; 49 N. Y. State Rep. 42.

⁴ Hague v. Ahrens, 53 Fed. Rep. 58.

⁵ Gorder v. Plattsmouth Canning Co., 36 Neb. 27; 41 Am. & Eng. Corp. Cas. 87.

⁶ Badische A. & S. T. v. Schott (1892), 3 Ch. 447.

⁷ Holt v. Kirby, 57 Ark. 83; White v. Benjamin, 138 N. Y. 623; 52 N. Y. State Rep. 151.

⁸ Orrick v. Stewart (Miss.), 12 S. Rep. 824; Tasker v. Crane Co., 55 Fed. Rep. 449.

⁹ Anderson v. Monroe, 55 Fed. Rep. 396.

¹⁰ Perine v. Grand Lodge A. O. U. W., 40 Am. & Eng. Corp. Cas. 407; Spencer v. Citizens' Mut. L. Ins. Co., 52 N. Y. State Rep. 442; Sutherland v. Standard L. & Acc. Ins. Co. (Iowa), 22 Ins. L. J. 353.

¹¹ Baden v. State (Ala.), 12 S. Rep. 419.

¹² Kelly v. State (Tex.), 20 S. W. Rep. 365.

¹³ Sutton v. People, 145 Ill. 279.

¹⁴ King v. State, 91 Tenn. 617; Faulkner v. Territory (N. M.), 30 Pac. Rep. 905.

¹⁵ Loregrove v. State, 31 Tex. Crim. Rep. 491; People v. Bemmerly (Cal.), 33 Pac. Rep. 263.

the defense is that a contract was made to compound a felony, the party alleging it must show that there was an agreement to compound felony, and that the plaintiff knew the illegal consideration at the time of making the contract, and that the contract was the result of such agreement. A contract made on Sunday, delivered on a secular day, is not illegal. The same rule prevails if a subsequent ratification is made on a secular day.

§ 25. **Usury.**—Where usury is advanced as a defense it must be pleaded in order to be admissible, and the general allegation without stating the facts is not enough. There is no presumption that the usury laws of this state prevail in any other state or country. The affirmative of the issue is upon the defendant to prove not merely usurious intent but the fact from which usurious intent is to be presumed. The fact that the contract is in writing does not exclude oral evidence to show that it was usurious. The substantial evidence as to rate exacted, or as to ground of pretext on which it was exacted, is material to avoid if plaintiff was not misled to his prejudice. The evidence must sustain the inference that both parties were cognizant of the facts essential to usury, and that there was intent both on the part of the lender and of the borrower. Reservation of interest in cases of legal limit is presumptive evidence of usury. The subsequent payment of a bonus in addition to interest will, without direct evidence of agreement, sustain the finding of an original agreement to pay it. Evidence of usage cannot be received to satisfy action otherwise proved to be usurious. Evidence that there had been an intent to deliver, and no delivery, is not enough on this point. Usury is a crime; and he who alleges it as a defense to an obligation to pay money must establish it by clear and satisfactory evidence. He enters upon the defense with the presumption against the violation of the laws and in favor of the innocence of the party charged with the usury. He cannot properly claim to have the usury inferred where the evidence is inconclusive and just as consistent with the absence as with the presence of usury. It is a just requirement that all the facts constituting the usury should be proved with reasonable certainty, and that they shall not be established

by mere surmise and conjecture, or by inferences entirely uncertain.¹

§ 26. **Constructive fraud — Burden of proof.**—Fraud as a general thing is not presumed, but must be proved by the party seeking to relieve himself from an obligation on that ground. When, however, the relations between the parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence or trust justifiably reposed, unfair advantage in a transaction is rendered probable, then the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood. So undue influence, which is a species of fraud, when relied upon to annul a transaction *inter partes*, or a testamentary disposition, must be proved and cannot be presumed. But the relation in which the parties to a transaction stand to each other is often a material circumstance, and may of itself, in some cases, be sufficient to raise a presumption of its existence; and where the situation is shown, then there is cast upon the party claiming the benefit or advantage the burden of relieving himself from the suspicion thus engendered, and of showing, either by direct proof or by circumstances, that the transaction was free from fraud or undue influence, and that the other party acted without restraint, and under no coercion or any pressure, direct or indirect, of the party benefited. This does not proceed upon a presumption of the validity of the particular transaction, without proof. The proof is made, in the first instance, when the relation and the personal intervention of the party claiming the benefit is shown.² Thus, one who has acquired a position of superior influence or advantage over another, by reason of relationship, trust or confidence, will be required to show that his

¹ Matter of Consalus, 95 N. Y. 340; Rep. 759; White v. Benjamin, 138 Stillman v. Northrup, 109 id. 473; 16 N. Y. 623; 52 N. Y. State Rep. 151. N. Y. State Rep. 417; Baldwin v. ² Green et al. v. Roworth et al., 113 Doying, 114 N. Y. 452; 23 N. Y. State N. Y. 462; 23 N. Y. State Rep. 149.

business dealings with the other were conducted fairly and honestly.¹ Thus, a residuary legatee who himself wrote the will has the burden of showing its validity and that the testator knew its contents.² In other cases the burden of proof of undue influence is on the party alleging it.³

IX. PAYMENT.

(1) As a general rule payment is not admissible in evidence unless it is pleaded, and the party pleading has the burden of proof.⁴

(2) Under a general allegation of payment the party may show any mode of payment; but if payments pleaded are specific, evidence of other payments are not admissible.⁵

(3) Part payment accepted in full may be proved as a bar, there being a sealed release, on proof that it was made for a compromise and accepted on release of the balance.⁶ In other cases payment and acceptance of a sum of money less than the liquidated debt is only part payment, and a receipt in full may be rebutted.⁷

(4) It is competent to show the admission of the creditor or of his agent, made within the scope of his authority, that he had received payment.⁸

(5) Crediting on an open account implies the intent to apply to the early items, but crediting on a private account is not conclusive unless communicated to the debtor.

(6) At common law and in equity great lapse of time without part payment may tend to show payment. The presumption applies to any obligation that may be extinguished by an act of payment. This presumption is not like the statute of limitation, but a mere bar to the remedy, and is a

¹ *Clarke v. Kirschner*, 118 Mo. 290.

² *Garrett v. Heflin* (Ala.), 13 S. Rep. 326; *Hill v. Miller*, 50 Kan. 659; *Little v. Knox* (Ala.), 11 S. Rep. 443.

³ *Bulger v. Ross* (Ala.), 12 S. Rep. 803; *Re Pitt's Estate* (Wis.), 46 Alb. L. J. 71; *Maddox v. Maddox* (Mo.), 21 S. W. Rep. 499; *Re Edson's Will*, 70 Hun, 122; 53 N. Y. State Rep. 807; *Chandler v. Jost* (Ala.), 11 S. Rep. 636; *Re Lowman's Estate*, 22 N. Y. Sup. 1055; *Livingston's Appeal*

(Conn.), 23 Atl. Rep. 470; *Williard v. Pinard* (Vt.), 26 Atl. Rep. 67.

⁴ *Hawes v. Wollcock*, 30 Wis. 213; *Quin v. Lloyd*, 41 N. Y. 349; *Von Giesen v. Von Giesen*, 10 N. Y. 316.

⁵ *Hoddy v. Osborn*, 9 Iowa, 517; *Farmers' & Citizens' Bank v. Sherman*, 33 N. Y. 69.

⁶ *Blair v. Waite*, 69 N. Y. 113.

⁷ *Keeler v. Salisbury*, 33 N. Y. 648; *Elsworth v. Fogg*, 35 Vt. 355.

⁸ *Fort v. Gooding*, 9 Barb. 371.

prima facie extinguishment of the debt; not, however, available to support allegations of payment as ground of affirmative relief.

(7) Possession of negotiable security payable to bearer is presumptive evidence of authority to receive payment. The presumption of authority terminates upon the principal's death.¹

(8) Payment of a debt to a sheriff who holds an execution against the debtor is good against the creditor. The mere issue and delivery of an execution is not evidence of payment of judgment. A levy on chattels is presumptive evidence of satisfaction only when the property of the debtor has been applied to the execution.²

(9) A check or draft drawn by debtor payable to order of creditor and shown to have been paid by the bank or drawee to the creditor and indorsed by him, and shown to have been paid, without other evidence that it was paid to him, is presumptive evidence of the payment of the amount by the debtor to the creditor without evidence that the creditor received the paper from the debtor.

(10) Payment of collateral security is presumptive evidence of payment on the principal.

(11) In a conflict of evidence on a question of payment of a written instrument, possession of security by the creditor is competent as evidence of non-payment.³ But possession of the debtor or obligor is not conclusive presumption of payment.⁴

(12) The defendant may show that after the time when the debt sued for is alleged to have become due and payable, the plaintiff gave him a promissory note for the payment of money. Such evidence is a legal presumption that no previous indebtedness from defendant to plaintiff existed.

(13) A receipt remaining in the creditor's possession is not, without explanation, evidence that the payment acknowledged in it was made;⁵ but a receipt, unexplained and uncontradicted, when in the possession of the debtor is conclusive.⁶

¹ *Megary v. Funtis*, 5 Sandf. 376.

⁴ *Graves v. Wood*, 3 B. Mon. (Ky.)

² *United States v. Dashiell*, 3 Wall. 34.

683.

⁵ *Nelson v. Bolan*, 37 Mo. 432.

³ *Brembridge v. Osborn*, 1 Stark.

⁶ *Lambert v. Seely*, 17 How. Pr. 430.

374.

(14) The payment of a less sum, if accompanied with anything given by the debtor to the creditor which the law can construe as a benefit, and accepted as satisfaction of the whole, is a good accord and satisfaction.

(15) Upon a showing that the creditor received the obligation of a third person to be satisfaction if paid at maturity, the burden is on the defendant to prove that it was so paid.

(16) It seems that a party cannot prove the payment of a debt by the transfer of securities without producing the securities.¹

(17) Paper made by the debtor or any other person, or the draft or order of the debtor taken by the creditor of the debtor, is presumed not to have been accepted in payment, but only as conditional payment suspending the right of action. The burden is on the debtor to show that it was given and received as payment.² It is otherwise as to the obligations of other persons transferred by the debtor to the creditor at the time of the creation of the debt.³ And the acceptance of negotiable paper on an agreement that it shall be satisfaction extinguishes the original debt.⁴

(18) The delivery of property other than money by the debtor to the creditor is presumed to be security rather than payment.

(19) Where the individual note of one of two or more joint debtors or parties is given for the joint debt, evidence that judgment was subsequently recovered on it is not enough to show that it operated as payment.

(20) Tender cannot be proved unless it is shown that the tender has been kept good and the money paid into court. The tender of a check of a party for money, if not objected to, is sufficient.

(21) On the mere question of payment it is not competent to show that it was the debtor's habit to pay his debts promptly, nor that he was responsible. But such evidence may be competent on the question whether the debt ever existed.

¹ Daniel v. Johnson, 29 Ga. 207.

³ Young v. Stahelin, 34 N. Y. 258.

² Nightingale v. Chaffee, 11 R. I.

⁴ Wescott v. Keeler, 4 Bosw. 564.

609; Gibson v. Toby, 46 N. Y. 637;

Haines v. Pearce, 41 Md. 221.

X. ASSIGNMENT.

§ 27. **In general.**— The assignment of a debt may be made by parol,¹ and the courts will presume an assignment from the fact that the plaintiff, being entitled to relief and with intent to enforce the claim, for his own reimbursement paid the one who was legally entitled.² The test of an equitable assignment is whether the debtor would be justified in paying the debt or the portion contracted to be paid to the person claiming to be assignee. There must be shown to have been surrender of control over the property assigned by the assignor to the assignee.³ Where there is no consideration for assignment shown, and no delivery, the assignment, if for the price of fifty dollars or over, or where the value of the property is not fixed by the assignment, and is proven to be worth that sum, must have been evidenced by some writing.⁴

§ 28. **Presumed when.**— As a general rule the assignment of a debt carries with it the title to an incidental or collateral security which is exclusively applicable to it. Thus, upon proof of the assignment of a bond, note or debt, a presumption arises that the mortgages given to secure it passed with it.⁵ But an assignment of a mortgage does not carry a bond or note to secure which it was given.⁶ It is a matter of intent whether upon the assignment of a thing in action it carries the right to those remedies inseparable from it which might have been expressly assigned.

§ 29. **Consideration of.**— Unless required by the statute of frauds, proof of a consideration for an assignment is not essential to the right of the assignee to maintain an action upon the assigned claim.⁷ An absolute assignment transfers the legal title;⁸ and the fact that part of the claim assigned when

¹ Perkins v. Peterson, 2 Colo. App. 242; Hooker v. Eagle Bank, 30 N. Y. 83.

² Moore v. Davis, 57 Mich. 251; Fairbanks v. Sargeant, 117 N. Y. 320; 27 N. Y. State Rep. 320.

³ Lanigan v. Bradley, etc. Co., 50 N. J. Eq. 201.

⁴ Buskirk v. Cleveland, 41 Barb. 610; Clark v. Fey, 121 N. Y. 470; 31 N. Y. State Rep. 424.

⁵ Patteson v. Hull, 9 Cow. 747; Jackson v. Blodgett, 5 id. 202; Cady v. Sheldon, 38 Barb. 103.

⁶ Merritt v. Bartholick, 36 N. Y. 44. ⁷ Bonner v. Beaird, 43 La. Ann. 1036; Merrick v. Brainard, 38 Barb. 574.

⁸ Cummings v. Morris, 25 N. Y.

collected was to be paid to the assignor will not affect its absoluteness.¹ In a written assignment a consideration will be presumed,² and the defendant cannot show that there was no consideration.³ It is sufficient to show that the assignee's recovery will bar the right of the assignor. If it was valid as between the parties to it the defendant cannot question it, though he show fraud on the part of the parties; except that proof that the assignment was absolutely illegal is competent, as where an attorney purchased a claim for the purpose of bringing an action on it.⁴

§ 30. **By gift.**—If the plaintiff claims under a gift *inter vivos*, there must be proof not only of an intention to give, but such a transfer of the subject-matter as will pass the donor's title at once to the donee.⁵ A gift of a colt may be effected by a simple declaration where it is on the donee's farm;⁶ and a gift of savings-bank deposits may be consummated by the delivery of the savings-bank book without any written order of the donor.⁷ So a promissory note will pass by delivery without indorsement as a gift *inter vivos*.⁸ So a gift of a debt may be made by giving a receipt.⁹

§ 31. **Execution and delivery of written assignment.**—The execution of a written assignment may be proved like any other instrument.¹⁰ Proof of delivery is shown when the plaintiff produces the assignment duly executed.¹¹ A general assignment will pass all articles though not named in a schedule. Where the assignment is made by a corporation the plaintiff must show the existence of the corporation, but as against the debtor an assignment is presumed valid.¹² Where the assignment is questioned by creditors of the corporation, the

¹ Durgin v. Ireland, 14 N. Y. 322.

² Eno v. Crook, 10 N. Y. 60.

³ Stone v. Frost, 61 N. Y. 614.

⁴ Mann v. Fairchild, 3 Abb. Ct. App. Dec. 152; Waterbury v. Westervelt, 9 N. Y. 598; Petersen v. Chemical Bank, 32 id. 21.

⁵ Matthews v. Hoagland, 48 N. J. Eq. 455; Sourwine v. Claypool, 138 Pa. St. 126; Buckner v. Meyer, 43 Fed. Rep. 202.

⁶ Porter v. Gardner, 60 Hun, 571; 39 N. Y. State Rep. 671.

⁷ Ridden v. Thrall, 35 N. Y. State Rep. 913; 125 N. Y. 572.

⁸ Bingham v. Stage, 123 Ind. 281.

⁹ McKenzie v. Harrison, 120 N. Y. 260; 30 N. Y. State Rep. 434.

¹⁰ Holbrook v. New Jersey Zinc Co., 57 N. Y. 616.

¹¹ Story v. Bishop, 4 E. D. Smith, 423.

¹² Kennedy v. Cotton, 28 Barb. 59; Belden v. Meeker, 47 N. Y. 307.

plaintiff must show that he was a *bona fide* purchaser for value without notice.¹ To show the authority of the officers of the corporation to make the assignment, their official character may be proved by witnesses.² In an action between a stranger to a written assignment and a party to it, as well as between strangers, either may give parol evidence to vary it; and unless both parties to the action are parties to the instrument sued upon, either can give parol evidence to vary it.³ The assignee of a chose in action, except negotiable paper before due, takes it subject to all equities existing against the assignor at the time of the assignment in favor of the debtor and his assignees and representatives.⁴ After a debtor has notice of the assignment of a claim against him, any dealings between him and the assignor are not binding upon the assignee.⁵

§ 32. **By trustees, executors, etc.**—In an action by a trustee, assignee in insolvency, executor, etc., or by one claiming as a purchaser from such representative persons, the plaintiff is bound to prove the authority of such representatives to the chose in action sued upon.⁶

XI. CORPORATIONS AND CORPORATE EXISTENCE.

§ 33. **De facto.**—Mr. Abbott, in his Trial Evidence,⁷ states the rule as to corporations in substance as follows:

(a) "When it becomes necessary to prove the incorporation of either the plaintiff or defendant it is enough to prove existence under the color of law, without proving a regular origin of existence in conformity to law.⁸ In the following cases it is necessary to give strict proof of incorporation, viz.: (1) Where the question is whether there is a corporate power to take by will; (2) in actions on subscriptions for stock; (3) where it is attempted to exercise the right of eminent do-

¹ Houghton v. McAuliffe, 2 Abb. Ct. App. Dec. 409.

² Merchants' Bank v. State Bank, 10 Wall. 604.

³ Dempsey v. Kipp, 61 N. Y. 462; Coleman v. First National Bank, 53 id. 388.

⁴ Green v. Warnick, 64 N. Y. 224.

⁵ Myers v. Davis, 22 N. Y. 489;

Hermans v. Ellsworth, 64 id. 161; Thayer v. Daniels, 113 Mass. 129.

⁶ Rockwell v. Brown, 54 N. Y. 210; Cone v. Purcell, 56 id. 649.

⁷ Pages 18-53.

⁸ Benesch v. John Hancock Mut. L. Ins. Co., 32 N. Y. State Rep. 73 (1890); Glenn v. Liggett, 47 Fed. Rep.

472.

main;¹ (4) in actions by the state to put an end to corporate existence.² In such cases the plaintiff must prove (1) legislative sanction; (2) existence under color of such sanction;³ (3) regularity of origin under such sanction.⁴

(b) "No presumption of incorporation arises from the fact that the business was transacted by a president and secretary;⁵ and carrying on business in a corporate name is not evidence of user which can be considered in aid of legal corporate existence, where there is no law authorizing the members to file their articles of incorporation or to become incorporated.⁶ The charter or statute under which the corporation is formed is the best evidence of legislative sanction.⁷

(c) "The courts take judicial notice of the general law under which corporations are formed, but not of the organization of the company under it.

(d) "Legislative sanction having been shown, the existence of the corporation may be shown (1) by evidence that the parties dealt together on the basis of a corporation; (2) by evidence of the formal acceptance of the charter, or the organization of the incorporators under the statute; (3) by evidence that they have actually proceeded to exercise corporate franchise.

(e) "He who has in any way dealt with a company as a corporation is presumed to have admitted its existence. And a mere trespasser cannot require evidence of regular organization.⁸ One who has received and enjoyed a consideration from a company cannot require further proof of its corporate power to contract; and he who has participated in the steps of organization of a corporation cannot object to the regularity of those steps.

¹ *Re Split Rock Cable Road Co.*, 128 N. Y. 408; 34 N. Y. State Rep. 169.

² *Stein v. Bienville Water Supply Co.*, 141 U. S. 67; *Jones v. Dana*, 24 Barb. 398.

³ *Hallstead v. Curtiss*, 143 Pa. St. 352; *Burton v. Rathbone, S. & Co.*, 23 Ill. App. 654.

⁴ *Toledo Electric Street R. Co. v. Toledo Const. Street R. Co.*, 26 Ohio L. J. 172.

⁵ *Clark v. Jones*, 87 Ala. 474.

⁶ *Eaton v. Walker*, 76 Mich. 579; *Welch v. Old Dominion Min. & R. Co.*, 56 Hun, 650; 31 N. Y. State Rep. 916.

⁷ *Alloway v. Nashville*, 88 Tenn. 510; *Bow v. Allenstown*, 34 N. H. 351.

⁸ *Goulding v. Clark*, 34 N. H. 148.

(*f*) "The presumption is that a statute published by authority of the government was correctly passed in respect to form.

(*g*) "To prove the charter or general law of incorporation of another state, a certified copy of such charter or law, certified by the secretary of state, is competent. So the existence of a foreign corporation may be proved by an exemplified copy, certified in the manner prescribed by the law of the forum, or the statute or charter may be read from the officially promulgated publication of the laws or edicts of the foreign state containing the charter.

(*h*) "A corporation may be created by the laws of several states and become a distinct corporation in each, domiciled therein.¹

(*i*) "Acceptance of a charter may be shown by the minutes of the corporation or by notice of acceptance, and any decisive corporate act is competent evidence of acceptance.² No proof of acceptance of a charter is necessary in the case of a municipal corporation.³

(*j*) "Where a corporation is organized under a general statute, the existence of the corporation may be proved by producing the certificate of organization with proof of its filing.⁴ Where it is necessary to show an official certificate that it is so authorized to do business from supervising state officers, such certificate must be produced.⁵ Thus, in an action for tolls, the official certificate is the only evidence competent."⁶

(*k*) "Except in actions by the state, or upon subscription contract, the fact that the corporation did not comply with the express conditions of the charter or general law does not affect the case, if there is color of organization and proof of user.⁷

¹ Gurnault v. Louisville & N. R. Co., 41 La. Ann. 571.

² Astor v. New York Arcade R. Co., 113 N. Y. 93; 22 N. Y. State Rep. 1; State v. Dawson, 22 Ind. 272.

³ Berlin v. Gorham, 34 N. H. 266.

⁴ Shiffer v. Adams, 13 Colo. 572; Chamberlain v. Huguenot Manuf. Co., 118 Mass. 532.

⁵ East St. Louis Connecting R. Co. v. Wabash, St. L. & P. R. Co., 24 Ill. App. 279.

⁶ Jones v. Dana, 24 Barb. 402; Bank of Toledo v. International Bank, 21 N. Y. 542.

⁷ Leonardsville Bank v. Williard, 25 N. Y. 574; Williams v. Cheney, 3 Gray, 220.

(7) "As a general rule, in actions by or against corporations the other party sufficiently supports this allegation of incorporation by showing the charter, or general law and certificate filed, together with the actual use of the powers and privileges of an incorporated company under the name designated in the charter or certificate.¹ Thus, suing by a name of incorporation, to have and use a common seal, is proof of user."²

§ 34. Estoppel by and against.— Mr. Abbott, in his Trial Evidence,³ says:

(a) "A parol admission that the body was incorporated is competent evidence against the party who made it, but is not conclusive in the absence of circumstances raising an equitable estoppel against him.⁴ And estoppel does not conclude a party as to the existence of legislative sanction. But where there is a charter under which a company can become a corporation, if the company does *de facto* organize and hold itself out as a corporation, contracting obligations as such, it cannot, when sued upon such obligations by persons who have dealt with it as such in good faith, avoid a corporate liability thereon by setting up that it has not taken all the steps prescribed as conditions precedent to its legal existence.⁵ And where it has dealt in excess of its powers, and retains the fruits of its dealings, it cannot, nor can any one in its place, refuse to pay the consideration to one who acted in good faith."⁶

(b) "Where a society or association holds itself out as a corporation, and acts as such in making a contract, it is liable as a corporation, whether it has a legal corporate existence or not."⁷

(c) "One who has contracted with a *de facto* corporation,

¹ Benesch v. John Hancock Mut. Nostrand, 106 Mass. 559; Welland L. Ins. Co., 32 N. Y. State Rep. 73; Canal Co. v. Hathaway, 8 Wend. Narragansett Bank v. Atlantic Silk 480.
Co., 3 Metc. 282.

² Buffalo, etc. R. Co. v. Cory, 26 N. Y. 76; Commonro v. Bakeman, 105 Mass. 56; United States Bank v. Stearns, 15 Wend. 314.

³ Pages 18-53.

⁴ Hungerford Nat. Bank v. Van

⁵ Doyle v. San Diego Land & T. Co., 46 Fed. Rep. 709; Slocum v. Warren, 10 R. I. 124.

⁶ Parish v. Wheeler, 22 N. Y. 494.

⁷ Scheufler v. Grand Lodge A. O. U. W., 45 Minn. 256.

either directly or through an agent designated as such in an obligation naming the corporation, and who retains the fruits of his dealings with it, cannot set up the defense of *ultra vires*, nor contest his liability in respect to such dealings, on the ground of any defect of its organization.”¹

§ 35. **Powers of corporations.**—Mr. Abbott, in his Trial Evidence,² says: “The acceptance of new or additional power, subsequent to the charter, may be inferred from slight evidence of acceptance.”³ All persons dealing with a corporation must take notice of the powers conferred upon it by its charter, and that its agents cannot exercise any authority in excess of such powers.⁴ To charge a company upon the act of an officer or agent, it must be shown either that it was expressly authorized, or that it was performed with the knowledge and implied assent of the corporation or its authorized officers, or was subsequently ratified by them.⁵ Illegality is not presumed of the action of a corporation. And any formal contract of a corporation, not expressly forbidden or illegal, is valid against the corporation, when there is ground either for an equitable estoppel or for holding that the parties are not *in pari delicto* in exceeding the limits of the law.⁶ Acts done by them which presuppose the existence of other facts to make them legal are presumptive proof of such other facts.”⁷

§ 36. **Contracts of.**—All parol contracts made by the officers or agents of a corporation within the scope of the legitimate objects of its institution are express promises by the corporation.⁸ To sustain an action for goods sold, or the like, it

¹ Steam Nav. Co. v. Weed, 17 Barb. 578; Vater v. Lewis, 36 Ind. 288; Palmer v. Lawrence, 3 Sandf. Ch. 161.

² Pages 18-53.

³ Railway Co. v. Allerton, 18 Wall. 233.

⁴ Fitzhugh v. Franco-Texan Land Co., 81 Tex. 306; Macon & B. R. Co. v. Stamps (Ga.), 11 S. E. Rep. 442; Bohm v. Loewer's Gambrinus Brewery Co., 30 N. Y. State Rep. 424 (1890).

⁵ First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 290.

⁶ Dewey v. Toledo, A. A. & N. M. R. Co. (Mich.), 51 N. W. Rep. 1063; Bis-sell v. Michigan S. & N. I. R. Co., 22 N. Y. 258; Mead v. Keeler, 24 Barb. 20; Cunningham v. Massena Springs & F. C. R. Co., 63 Hun, 439; 44 N. Y. State Rep. 723; Schurr v. New York & B. S. J. Co., 45 id. 645 (1892).

⁷ Nelson v. Eaton, 26 Barb. 410.

⁸ Hand v. Clearfield Consol. Coal Co., 143 Pa. St. 408; Cicotte v. St. Anne's Church, 60 Mich. 552.

is not necessary to show a formal vote of the directors, authorizing the employment or purchase. It is enough to show that the officer or agent who made the contract did so within the scope of his duty, or with the knowledge of the directors, and they received its benefit.¹ Where the contract is in writing, the authority of the agent to sign it must be shown.² The minutes of the corporation signed by the clerk are sufficient evidence of authority, etc. Authority from a board of directors is presumptively enough.³ Where an instrument is executed under the seal of a corporation, it may be put in evidence without further proof, if it has been acknowledged as required for a deed of lands to be recorded. And a contract executed in the name of a corporation by its president and secretary, sealed with its corporate seal affixed by the proper officers, is presumptively valid and binding upon the corporation.⁴ In other cases the seal must be proved to be genuine.⁵ A corporation seal, undisputed, is *prima facie* evidence that the act is that of the corporation.⁶

§ 37. **Torts of.**—The evidence to charge a corporation with a tort of its agent or officer depends on the general principles of agency.⁷ It must be shown that he by whom it was done was at the time engaged in the business of his office or agency, and acting within its scope.⁸ It is no defense for the corporation to show that the act was the wilful and malicious act of the agent or servant, if the act was such that had it been done without malice the corporation would have been bound by it.⁹ False representations by officers or agents of a corporation, if brought home to the corporation as its acts, may be

¹ Hamilton Coal Co. v. Bernhard, 61 Hun, 624; 40 N. Y. State Rep. 875; v. Gridley, 25 Wend. 469; Chamberlain v. Bradley, 101 Mass. 188.

Dunn v. Rector of St. Andrews, 14 Johns. 118; Hooker v. Eagle Bank, 30 N. Y. 86; Fister v. La Rue, 15 Barb. 323. ⁶ St. John's Church v. Steinmetz, 18 Pa. St. 273.

² Argus Co. v. Mayor, etc., 55 N. Y. 495. ⁷ Springfield Engine & T. Co. v. Green, 25 Ill. App. 106; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30.

³ Smith v. Smith, 117 Mass. 72. ⁸ Messick v. Midland R. Co., 128 Ind. 81; Hunter v. Hudson River Iron Co., 20 Barb. 507.

⁴ Jourdan v. Long Island R. Co., 115 N. Y. 380; 26 N. Y. State Rep. 138. ⁹ Brewster v. Hatch, 122 N. Y. 349; Weed v. Panama R. Co., 17 N. Y.

⁵ Kelly v. Calhoun, 17 Alb. L. J. 55; Hoyt v. Thompson, 5 N. Y. 335; Finch

proved under an allegation of fraud committed by the corporation, if the acts be such as to bind the company.¹ Where the title to office or agency is involved only as incidental to the right or liability of the corporation growing out of the acts of the officer or agent, it may be proved by showing that the person acted as such and was generally reputed to be such, and that the corporation held him out as its officer, or permitted him to assume the office, or had ratified his acts as such.²

Mr. Abbott, in his *Trial Evidence*,³ states the rule as follows: "An agency is defined, not by the authority which the agent or officer receives from his principal, but by that which the latter allows the former habitually to assume and exercise.⁴ If an official report, containing material misrepresentations of fact as to its affairs, was presented to a public and general meeting of the corporators, and was sanctioned by the meeting and subsequently circulated by the directors for the benefit of the company, it will bind them.⁵ The admissions and declarations of officers and agents of a corporation depend on the same rules applicable to agents of individuals.⁶ Notice to a corporation may be proved by showing notice either (1) to the board of directors or a previous board; (2) to its officer or agent who was at the time acting for the corporation in the matter in question, and within the range of his authority; or (3) to one whose duty it was to receive and communicate such information."⁷

§ 38. **Books and papers of.**—Mr. Abbott, in his *Trial Evidence*,⁸ states the rule to be, that "the books and papers of a corporation are evidence for and against strangers to it in

¹ *Hill v. C. F. Jewett Pub. Co.*, 154 Mass. 172; *King v. Fitch*, 2 Abb. Ct. App. Dec. 508.

² *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 98; *Dexter v. Long*, 2 Wash. 435; 26 Am. St. Rep. 867; *Partridge v. Badger*, 25 Barb. 173; *Pusey v. N. J. R. Co.*, 14 Abb. Pr. (N. S.) 441.

³ Pages 18-53.

⁴ *Bridenbecker v. Lowell*, 32 Barb. 9-18; *Olcutt v. Tioga R. Co.*, 27 N. Y. 546.

⁵ *American Wire-Nail Co. v. Bayless* (Ky.), 15 S. W. Rep. 10; *Bean v. American Loan & T. Co.*, 122 N. Y. 622; 34 N. Y. State Rep. 620.

⁶ *Gott v. Dinsmore*, 111 Mass. 51; *McGinness v. Adriatic Mills*, 116 id. 117; *Anderson v. Rome, Watertown & O. R. Co.*, 54 N. Y. 334; *First Nat. Bank v. Ocean Nat. Bank*, 60 id. 278.

⁷ *North River Bank v. Aymar*, 3 Hill, 262.

⁸ Pages 18-53.

some cases. Thus, where the record itself constitutes the act, the fact to be proved, when directly in issue, is the record; for example, the act of organizing may be proved by the books, either in favor of the corporation or creditors and against members and strangers. And in general, a resolution or other deliberate act of a corporation may be proved in its own favor, or in favor of a stranger, against any one who takes issue upon it.¹ The authenticity of the books may be shown by any witness who can state of his own knowledge that they are the books of the corporation; that they have been regularly kept by the proper officer; that they come from the proper custody; and that he knows of his own knowledge that the entries offered are correct records of the transactions they profess to record."²

XII. EXECUTORS AND ADMINISTRATORS.

§ 39. **Title.**—Executors and administrators are trustees of the property in their hands, and derive their powers from letters granted by the probate court of the state in which they act.³ The plaintiff must come prepared to prove the appointment of the executor or administrator, if a party. The best proof is the original letters, testamentary or of administration,⁴ or a duly certified copy. The letters qualify the holder to sue and be sued;⁵ and the giving of the bond and taking of the oath is presumed.⁶ The recital, in the letters, of the jurisdictional facts is *prima facie* evidence that they existed.⁷

§ 40. **Acts and declarations of representatives.**—Some admissions and declarations of an executor or administrator are competent evidence against the estate if made while he was clothed with official authority in an action by him.⁸ But admissions of an executor or administrator as to past transactions of his testator or intestate, and not within his personal

¹ 1 Greenl. Ev., § 548.

² 1 Whart. Ev., § 639; 1 Greenl. Ev., § 483.

³ Rich v. Sowles, 64 Vt. 408; Re Meyers, 131 N. Y. 409; 43 N. Y. State Rep. 265; Doolittle v. Lewis, 7 Johns. Ch. 45; Allen v. Bishop, 25 Wend. 414; Babcock v. Booth, 2 Hill, 181; Dox v. Backenstose, 12 Wend. 542.

⁴ Noonan v. Bradley, 8 Wall. 394; Remick v. Butterfield, 31 N. H. 70, 80; Belden v. Meeker, 47 N. Y. 307.

⁵ Maloney v. Woodin, 11 Hun, 202.

⁶ North v. People, 139 Ill. 81.

⁷ Belden v. Meeker, 47 N. Y. 307; Forley v. McConnell, 52 id. 630.

⁸ Meinert v. Snow, 2 Idaho 851; 1 Greenl. Ev., § 215.

knowledge, are not admissible as part of the *res gestæ*.¹ Where there are several co-representatives, the admissions and declarations of one are not competent against the others. In short, the admissions and declarations of executors and administrators are admissible against the estate only when made touching matters of business then pending.² Where an executor or administrator is a party, the admissions and declarations as such, made by the decedent in his life-time, are competent against the representatives.³

XIII. TESTIMONY OF INTERESTED WITNESSES AS TO TRANSACTIONS WITH DECEDENT.

§ 41. **In general.**—The general policy of the American statutes is to restrain the admission of the testimony of a party or interested witness as against the estate of a deceased person, or the interest of one succeeding to his right.⁴ Thus, testimony of a party given in his own behalf as to matters which, if true, were equally within the knowledge of a deceased party, is inadmissible against one sought to be charged with a trust as assignee of the deceased and his devisees.⁵ Nobody would be safe in respect to his pecuniary transactions if legal documents found in his possession at the time of his death, and endeavored to be enforced by his executors, could be set aside or varied or altered by the parol evidence of the person who bound himself.⁶ It would be easy, of course, for anybody who owed a testator a debt to say, "I met the testator and gave him the money."⁷ The evidence of justice and the interest of mankind require that such evidence should be wholly disregarded. A party to the action or proceeding cannot be thus examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest,⁸ if he or his predecessor in interest is at the time of the trial interested in the event of the action or proceeding, whether directly interested in the cause of action or pro-

¹ Davis v. Gallagher, 124 N. Y. 487; 36 N. Y. State Rep. 461.

² Bloodgood v. Bruen, 8 N. Y. 362.

³ Barker v. White, 58 N. Y. 204.

⁴ Wilcox v. Corwin, 117 N. Y. 500; 201 N. Y. State Rep. 836.

⁵ Ripley v. Seligman, 88 Mich. 177.

⁶ Duffield v. Hue, 129 Pa. St. 94.

⁷ Carey v. Carey, 104 N. C. 171.

⁸ Crothers v. Crothers, 149 Pa. St.

ceeding, or whether merely liable to be legally affected by the judgment.¹ And it is generally provided by statute in the different states that no person from, through or under whom such party or interested person derives his interest or title by assignment or otherwise can be thus examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest.² Thus, a party cannot testify that he saw deceased sign a paper,³ nor that he carried an inkstand with him when he had a personal interview with deceased,⁴ nor to his intent in making a transfer to the deceased.⁵ A plaintiff in ejectment may testify as to a line surveyed and corner marked by him in the presence of the defendant's grantor, since deceased, at the time of plaintiff's conveyance to such grantor, need not have been personally present.⁶ So in an action for partition by a grantee of heirs of defendant's deceased grantor, the defendant is competent to testify that he had occupied the property, rented it and collected the rents and been in possession of his deed for thirty years.⁷ When, however, the party for whose protection the law declares the testimony incompetent is examined in his own behalf as to the transaction or communication in question, or where the testimony of the deceased or lunatic as to it is given in evidence by the party adverse to the one calling the witness, the prohibition does not apply.⁸ If a witness testifies that a party admitted certain transactions with the deceased, the party may contradict this.⁹ In all cases the witness may be sworn, but his examination must be restricted to the matters as to which the objecting party has given the evidence.¹⁰

¹ *Cole v. Gardner*, 67 Miss. 678; see *Marsh v. Richardson*, 106 N. C. 539.
² *Hard v. Huison*, 49 Ala. 92.

³ *Hard v. Ashley*, 63 Hun, 634; 44 N. Y. State Rep. 792; *Morrison v. Morrison*, 140 Ill. 560; *Bennett v. Austin*, 5 Hun, 536; *Fox v. Clark*, 61 Barb. 216; *Ripley v. Seligman*, 88 Mich. 177.

⁴ *Smith v. Sergeant*, 2 Hun, 107.

⁵ *Dubois v. Baker*, 30 N. H. 355.

⁶ *Tooley v. Bacon*, 70 N. Y. 37. But 472.

⁶ *Marsh v. Richardson*, 106 N. C. 539.

⁷ *Strough v. Wilder*, 49 Hun, 405.

⁸ *Miller v. Adkins*, 9 Hun, 9.

⁹ *Nelson v. Masterson*, 2 Ind. App. 524; *Martin v. Jones*, 59 Mo. 187; *Cousins v. Jackson*, 52 Ala. 265.

¹⁰ *Brown v. Richardson*, 20 N. Y. 472.

XIV. ACTIONS TO CHARGE NEXT OF KIN WITH ANCESTOR'S DEBT.

In an action against heirs or next of kin in New York, on a debt of the ancestor, the plaintiff must make a case within the statute which creates the right of action.¹ He must show that letters have been duly granted;² that three years have elapsed since the granting of the letters;³ that defendant inherited real property by descent, or acquired real or personal property under the decedent's will or the statute of distribution, and that the decedent left no personal property within the state sufficient to pay the debt, or that the debt could not be collected by due proceedings from the personal representatives of the decedent, nor from the next of kin or legatees.⁴ The return of an execution unsatisfied against the executor or administrator is not sufficient proof of want of assets, nor does a judgment against the executor or administrator prove the existence of the claim or demand;⁵ nor does lapse of time since administration granted create any presumption as to the statutory conditions.⁶ The plaintiff should allege and prove that an accounting by the executor or administrator has been had. A judgment or verdict for or against an executor or administrator is never conclusive against the heirs or devisees.⁷ It is not even competent evidence of the debt or other facts established thereby.⁸ A judgment or verdict for or against the heirs does not bind the devisees.⁹

XV. ADVANCEMENTS.

Parol evidence is admissible upon the distribution of the estate of a father to explain the surrounding circumstances of the conveyance by him to some of his children in his lifetime, and show that it was intended as an advancement.¹⁰ Where the division of the entire estate is subjected to the

¹ Mackay v. Riley, 135 Ill. 586; Kent v. Kent, 62 N. Y. 560; Rock-Messereaux v. Ryerss, 3 N. Y. 261. well v. Geary, 4 Hun, 611.

² Selover v. Coe, 63 N. Y. 443.

⁷ Vernon v. Valk, 2 Hill Ch. 257;

³ Roe v. Swezey, 10 Barb. 251.

Dale v. Rosevelt, 1 Paige, 35.

⁴ Stuart v. Kissam, 11 Barb. 282.

⁸ Kent v. Kent, 62 N. Y. 560.

⁵ Stuart v. Kissam, 11 Barb. 282;

⁹ Cowart v. Williams, 34 Ga. 167.

Sharp v. Freeman, 45 N. Y. 802.

¹⁰ McClanahan v. McClanahan, 36

⁶ Armstrong v. Wing, 10 Hun, 520; W. Va. 34.

statute of descent and distribution, a presumption arises that a substantial provision, beyond expenditures, for maintenance or education, and not characterized as a mere gift nor as creating a debt on the part of the child, was intended as an earnest of the inheritance, and to be deducted from the recipient's share of the estate on the parent's death.¹ The question in all cases is one of intent.² A deed from a parent to a child, expressed to be in consideration of "love and affection," or the like, raises a presumption of advancement.³ Where a decedent purchased property and had it conveyed to a child, who claims a share in his estate, the law presumes an advancement.⁴ The fact and the character of an advancement, even of real property, may be established by parol.⁵ An account kept by the donor, in which he charges the sum in a manner indicating his intent that it is to take effect as an advancement, may be sufficient without evidence that the donee knew of the charge.⁶ The declarations of the donor made at the time of the transaction are admissible as part of the *res gestæ*;⁷ and the declarations of the donor, made before the transaction, are competent on the question of his intent.⁸ But for the purpose of showing either that the transaction was an advancement, or that it was a debt, his declarations, made after he had parted with all power of revocation, are not competent against those who claim it as a gift; and for the purpose of showing that it was a debt, they are not competent against those who claim it either as a gift or as an advancement; for in either case they are declarations in his own favor.⁹

¹ McClanahan v. McClanahan, 36 W. Va. 34; Parks v. Parks, 19 Md. 323; Law v. Smith, 2 R. I. 244.

² Reynolds v. Reynolds, 13 Ky. L. Rep. 793; Alleman v. Manning, 44 Mo. App. 4; Weaver's Appeal, 63 Pa. St. 309; Bing. on Desc. 347; Oller v. Bonebrake, 65 Pa. St. 338.

³ Barbee v. Barbee, 109 N. C. 299; Adams v. Adams, 22 Vt. 50.

⁴ 2 Story's Eq., § 1204; Murphy v. Nathans, 46 Pa. St. 508; Prosius v. McIntyre, 5 Barb. 424.

⁵ Parker v. McCluer, 3 Abb. Ct. App. Dec. 454; Brown v. Brown, 16 Vt. 197.

⁶ Lawrence v. Lindsay, 68 N. Y. 108; Bing. on Desc. 382.

⁷ Wilson v. Beauchamp, 50 Miss. 24; Fellows v. Little, 46 N. H. 37; Woolery v. Woolery, 29 Ind. 254.

⁸ Powell v. Olds, 9 Ala. 861.

⁹ McNeil v. Hammond, 87 Ga. 618; Peck v. Peck, 27 L. T. (N. S.) 670; Sanford v. Sanford, 5 Lans. 486.

XVI. WILLS.

§ 42. **Extrinsic evidence affecting.**—(1) Wills are to be so construed by transposing, rejecting or supplying words that the intention of the testator may be expressed and carried out and unjust results avoided.¹ But parol evidence cannot be admitted to supply or contradict, enlarge or vary the words of a will, nor to explain the intention of the testator, except in two cases: (1) Where there is a latent ambiguity *dehors* the will as to the person or subject meant to be described, and (2) to rebut a resulting trust.² But what is said at the time of the execution and attestation is admissible as part of the *res gestæ*, though not to contradict the will.³ And it seems that extrinsic evidence is admitted to aid in reading, testing, applying and executing the testamentary declarations of intention.⁴ It is never allowable to establish the testamentary intention the testator has expressed, but simply to throw light upon the words of the will to show what he meant to do.⁵

(2) The intention or understanding of the parties must be determined from the language of the instrument viewed in the light of the existing circumstances,⁶ and declarations of the testator as to his wishes and intention are inadmissible. Circumstances existing at the time of the execution of a will may be given in evidence to determine the intention of the testator, but not those occurring subsequently.⁷

(3) The rules for the admission and exclusion of parol evidence in regard to wills are essentially the same which prevail in regard to contracts generally.⁸ Whatever is necessary to possess the court with an understanding of the language or characters in which the will is written may be supplied by extrinsic evidence.⁹ The principle is the same, whether the

¹ *Hotaling v. Marsh*, 132 N. Y. 29; 43 N. Y. State Rep. 544.

² *Rivers v. Rivers*, 36 S. C. 302.

³ *Sire v. Rumbold*, 39 N. Y. State Rep. 85; *Johnson v. Patterson*, 86 Ga. 725.

⁴ *Foster v. Dickerson*, 64 Vt. 233; *Mann v. Mann*, 1 Johns. Ch. 231.

⁵ *Paton v. Ormerod* (1892), Probate Division, 247.

⁶ *Denfeld v. Smith* (Mass.), 30 N. E. Rep. 1018.

⁷ *Morris v. Sickley*, 133 N. Y. 456; 45 N. Y. State Rep. 735.

⁸ *Lane v. Union Nat. Bank*, 3 Ind. App. 299; 1 Greenl. Ev., § 287; Redf. on Wills, 496.

⁹ *Petrie v. Phoenix Ins. Co.*, 132 N. Y. 137; 43 N. Y. State Rep. 478.

difficulty in reading the will arises from the fact that it was written in a foreign language or a peculiar dialect, or from the fact that the testator habitually used words of the common language in a peculiar way, or used characters and hieroglyphics instead of the common notation of the language.¹ Evidence is allowed to show what his habitual speech and notation were, leaving the court, in the light of the fact, to read the will and ascertain what was his intention.

(4) If the will contains language which has a provincial or local meaning, persons acquainted with the meaning of the words may be received as witnesses to translate or define them.² If he was accustomed to designate a person by a short name, such as a surname alone, or the baptismal name alone, or a pet name, or habitually to misname the person through confusing several names, or to use abbreviations or a cipher, they may be explained by evidence of his usage.³ But parol evidence is not admissible to show who were intended by a testator to be beneficiaries in a will, the will being silent on that point.⁴ And extrinsic evidence of what testator intended by using initials or ciphers in a bequest, as distinguished from evidence of what it was his common habit of speech or writing to use them for, is not admissible.⁵

(5) Unattested alterations in a will are not, as in case of other instruments, presumed to have been made before execution.⁶ The time when the alterations were made may be shown by the declarations of the testator. This may also be done by the testimony of an eye-witness.

(6) An error of date may be corrected by means of extrinsic evidence.

(7) It is competent to show that a particular part of it was not the testator's will; as, for instance, that a clause was interlined by another hand without authority, or that a particular part was inserted through undue influence, or that a sheet was not in the will at the time of its execution.⁷

¹ *Berry v. Kawalsky*, 95 Cal. 134; 28 Am. St. Rep. 548.

⁴ *Heidenheimer v. Bauman*, 84 Tex. 174; 31 Am. St. Rep. 29.

² *Bassett v. Martin* (Tex.), 18 S. W. Rep. 587.

⁵ *Clayton v. Nugent*, 13 Mees. & W. 200-207.

³ *Brown v. Stark*, 47 Mo. App. 370; Redf. on Wills, 630; *Ryerss v. Wheeler*, 22 Wend. 152; *Veell v. Charmer*, 23 Beav. 195.

⁶ 1 Redf. on Wills, 314.

⁷ *Charles v. Huber*, 78 Pa. St. 448; *Florey v. Florey*, 24 Ala. 241.

(8) Whenever extrinsic evidence is admitted to negative the genuineness of the testamentary act, it is also admissible to affirm it, and for that purpose the testator's declarations of intention may be received.¹ Evidence is admissible of the testator's situation at the time of making the will, the number of his family, the different kinds of property which he had, etc.² It is not essential that a legatee or devisee be named; a reference by which he may be ascertained when the time comes is enough, and then extrinsic evidence is competent to identify him.³ But it is different when the will is entirely silent on that question,⁴ and evidence to show that the intention of the testator is different from that plainly expressed in his will is inadmissible.⁵ So extrinsic evidence which goes beyond the purpose of aiding in the interpretation is inadmissible.⁶

(9) *Prima facie* the word "children" means legitimate children.⁷ Under a bequest to testator's "children," "nephews," etc., none but the testator's own legitimate children or nephews can take. But extrinsic evidence is admissible to show that there are none such, and that he was never married, but left illegitimate offspring, and that he recognized them as his children; or that the only nephews and nieces in the family were those of testator's wife.⁸

(10) It is not necessary that a corporation be designated by its legal corporate name. It may be designated by the name by which it is usually or popularly called or known, or by a name by which it was known and called by the testator, or by any name or description by which it can be distinguished from every other corporation.⁹ The circumstances to identify it as the body intended may be shown by parol.¹⁰

¹ Re Kelemen's Will, 126 N. Y. 73; 36 N. Y. State Rep. 390.

² Shulters v. Johnson, 38 Barb. 80; Terpening v. Skinner, 30 id. 373; Doe v. Provost, 4 Johns. 61.

³ Weed v. London & L. F. Ins. Co., 116 N. Y. 106; Faulkner v. National Sailors' Home, 155 Mass. 458; Holmes v. Mead, 52 N. Y. 332; 1 Redf. on Wills, 613; Webber v. Corbett, L. R. 16 Eq. 515.

⁴ Heidenheimer v. Bauman, 84 Tex. 174; 31 Am. St. Rep. 29.

⁵ Bradhurst v. Field, 45 N. Y. State Rep. 748; 18 N. Y. Supp. 535.

⁶ Landers v. Cooper, 115 N. Y. 279.

⁷ Cromer v. Pickney, 3 Barb. Ch. 466.

⁸ Clay v. Field, 138 U. S. 464.

⁹ Smith v. Kimball, 62 N. H. 606.

¹⁰ Lefevre v. Lefevre, 59 N. Y. 434.

(11) When it is shown that there is no person in existence who fully corresponds with the description in the will to indicate the donee, extrinsic evidence is admissible to ascertain to whom the designation points;¹ and proof may be given of the circumstances and habits of the testator, and the state of his family at the time he made the will, in order to ascertain the bearing and application of the language which he has used, and whether there exists any person to whom the whole description given in the will can be with sufficient certainty applied.² Thus, extrinsic evidence is admissible for the purpose of arriving at the real intent of the testator by identifying the person or thing described, and to remove an ambiguity in the description;³ and for that purpose evidence is competent that the testator was accustomed to call a person by the name used in his will, which is not the true name, or even by a name which the scrivener mistook by similarity of sound for that written in the will, and to which no other person answers.⁴

(12) Where a designation otherwise correct contains words which are false or inapplicable to the claimant, the false or inapplicable part may be rejected, if enough remains, in the light of competent extrinsic evidence, to identify the donee. The name may be rejected as false, leaving the description to control.⁵

Mr. Abbott, in his *Trial Evidence*,⁶ states the rule to be this:

(13) "Where there are two claimants of the same gift, if one alone precisely answers the whole designation of the will, extrinsic evidence that the other was intended is incompetent.⁷ If both precisely answer the whole designation and indications of the will, a latent ambiguity or 'equivocation' is presented and may be helped out by extrinsic evidence. So if neither precisely answers the designation and indications in the will. This happens not only where there is a legal name which fits both, but where there is a description only,

¹ *Smith v. Kimball*, 62 N. H. 606;
General Assembly Presby. Church v.
Guthrie (Va.), 6 L. R. A. 321.

² *Morris v. Sickley*, 133 N. Y. 456;
Hornebeck v. American Bible Society, 2 Sandf. Ch. 133; *Howard v. American Peace Society*, 49 Me. 297.

³ *Sturgis v. Work*, 122 Ind. 134.

⁴ 2 Phillips' Ev. 729.

⁵ *Conally v. Pardon*, 1 Paige, 291;
Wagner's Appeal, 43 Pa. St. 102;
Price v. Paige, 4 Ves. 679.

⁶ Pages 120-150.

⁷ *Smith v. Smith*, 1 Edw. Ch. 191;
Ayers v. Weed, 16 Conn. 291.

or a name used in common parlance, or a name which fits one claimant only, coupled with a description which fits the other only, or a designation which, without rejection of some terms, is false in application.¹

(14) "To identify the person or society which the designation in the will intends, the extrinsic evidence includes such facts as the testator's knowledge or ignorance of the donee in question, the fact that he conversed about it before making his will,² and the fact that he expressed a strong interest in it in conversation or in letters.³

(15) "Where the subject of the bequest is indicated in the will by words which do not have a fixed legal meaning, and especially words which refer to extrinsic circumstances—for example, 'a devise of,' 'the home and garden I now live in,' 'all my back lands,'—the meaning is to be ascertained by evidence explaining what were the extrinsic circumstances at the time referred to in the will.⁴ For that purpose evidence is admissible of the declarations of the testator before and after making the will showing his habit in the use of such expression, and what property he was accustomed to designate in this way.⁵

(16) "Where the identity of the thing applies equally in all its parts to more than one subject,—as where a testator devises his manor of T., and it appears that he has two such, one of north T. and one of south T.,—extrinsic evidence must determine which passes; and for this purpose the testator's declarations of intention may be proved.⁶ But where the words of the will are not ambiguous and no latent ambiguity or 'equivocation' is produced by extrinsic evidence, it is not competent to adduce evidence of the declarations of the testator or his instructions to the draftsman, for the purpose of showing that a different estate or interest from that indicated was intended.⁷

¹ 1 Redf. on Wills, 627, n.; Ayers v. Weed, 16 Conn. 300; Button v. American Tract Soc., 23 Vt. 350. *Stanford v. Lyons*, 18 Am. Rep. 736.

² Howard v. American Peace Soc., 49 Me. 298. ⁶ Fitzpatrick v. Fitzpatrick, 14 Am. Rep. 538; 1 Redf. on Wills, 650 and 584.

³ Brewster v. McCall, 15 Conn. 294.

⁴ Bradish v. Yocum, 130 Ill. 386.

⁵ Ryerss v. Wheeler, 22 Wend. 148;

⁷ Charter v. Otis, 41 Barb. 525; Hill v. Felton, 15 Am. Rep. 643; 47

Ga. 455; Ordway v. Dow, 55 N. H. 11.

(17) "Where it appears that one to whom a legacy, expressed in terms appropriate to a pure gift, was a creditor of the testator, the court will not presume that the bequest was intended to satisfy the debt, if by reason of the amount or the time of payment the bequest would not be as beneficial as ordinary payment by the estate; and in such case extrinsic evidence that the testator only intended to satisfy the debt is not competent.¹ But where the bequest and the debt are such that an equitable presumption arises that the bequest was intended in satisfaction, then extrinsic evidence, even by the declarations of the testator, is admissible to rebut the presumption. Where the same sum is given twice in the same will to the same legatee, the law presumes that the latter sum is a mere repetition; but extrinsic proof is competent for the purpose of rebutting the presumption.²

(18) "Where the language of the will is doubtful as to whether or not legacies are charged on real property, extrinsic evidence of the situation of testator and his property, and the surrounding circumstances, is competent to aid in determining the question."³

XVII. ADEMPMENT AND LAPSING.

A legacy lapses when the devisee dies before the testator and there is no other person authorized to take under the will;⁴ and where a parent bequeathes property to a child or grandchild, and afterwards, in his life-time, sells it, or if a father makes a provision for a child by his will, and afterwards gives to such child, if a daughter, a portion in marriage, or, if a son, a sum of money to establish him in business, provided such portion or sum be equal to or greater than the legacy, it will, in general, be deemed a satisfaction or ademption of the legacy.⁵ But this presumption may be overcome by evidence that such was not the intention. This is allowed, not to vary the terms of the will, but to establish, on behalf of the claimant, the acts and interests of the tes-

¹ Phillip v. McCombs, 53 N. Y. 494;
Fort v. Gooding, 9 Barb. 371.

³ Dey v. Dey, 19 N. J. Eq. 137.

⁴ Shadden v. Hambree, 17 Oreg. 14.

² De Witt v. Yates, 10 Johns. 156;
Whyte v. Whyte, 7 Moak's Eng. Rep. 672.

⁵ Hine v. Hine, 39 Barb. 507; Langdon v. Astor, 16 N. Y. 9; Paine v. Parsons, 14 Pick. 320.

tator. For this purpose the declarations of the testator are competent, both when made at the time of the transaction and when made before or after it.¹ The bequest of a certain bond by a testator to his wife is a specific and not a pecuniary or demonstrative legacy; and its payment to the testator before his death operates as an ademption or revocation of the legacy.²

XVIII. CITIZENSHIP AND ALIENAGE.

§ 43. In general.—Proof of the admission of a territory into the Union is sufficient proof that a citizen of what had been the territory was a citizen of the United States and the state;³ and a record of the order of a competent court admitting an alien to become a citizen, a certified copy of such order or proof of birth from a father who is a citizen of the United States, or birth in this country since 1882, is sufficient proof of citizenship.⁴ And where no record of naturalization can be proved, evidence that a person having the requisite qualifications to become a citizen did in fact vote and hold office is sufficient.⁵ So alienage may be proved by proving birth in a foreign country from a father not a citizen of this country. As to domicile, a person may belong to several places. The domicile of a person *sui juris* is proved by showing a residence at a particular place accompanied with evidence of an intention to remain there for a time not limited.⁶ A wife's domicile is proved by proving that of her husband if *sui juris*.⁷ The domicile of a legitimate minor is proved by proving the domicile of the father while he was living; after his death, that of the mother;⁸ but it does not follow any change in her domicile after remarriage.⁹ The domicile of an illegitimate minor is proved by proving the domicile for the time being of its mother.¹⁰ In case of soldiers, sailors, students

¹ Miner v. Atherton, 35 Pa. St. 528; Fed. Rep. 878; Mitchell v. United States, 21 Wall. 350.

² Humphrey v. Robinson, 52 Hun, 200; 23 N. Y. State Rep. 38.

⁷ Whart. on Conf. of Laws, § 44.

⁸ De Jarnett v. Harper, 45 Mo. App.

³ Boyd v. Nebraska, 143 U. S. 135. 415.

⁴ Young v. Peck, 21 Wend. 389; Ludlam v. Ludlam, 26 N. Y. 363.

⁹ Ludlam v. Ludlam, 26 N. Y. 356; Kennedy v. Ryall, 67 id. 386.

⁵ Boyd v. Nebraska, 143 U. S. 135.

¹⁰ Whart. on Conf. of Laws, § 37.

⁶ United States v. Chong Sam, 47

and persons under restraint, the residence of his wife at the places where he established her, or, if single, the place where he most usually resorted for board in the intervals of his return, is *prima facie* evidence of his domicile.¹ In some cases residence is equivalent to the place of domicile.² But a man may be a resident in one place and a commorant in another at the same time.³ Domicile once shown is presumed to continue until a new domicile is shown to be acquired. Merely abandoning the old abode, though without intent to return, does not divest the domicile.⁴ To constitute the new domicile two things are necessary: (1) Residence in the new locality, and (2) the intention to remain there, either permanently or for an indefinite time.⁵ The change cannot be made except *facto-et animo*: either without the other is insufficient.⁶

XIX. DEATH — PROOF OF.

Death may be proved by an official registry of the death, kept pursuant to statute, or by a church or other registry of burial. The presumption of law is that a person of whom nothing is known but that he was living at a certain time, continues to live, at least until he would have reached the age of one hundred, after which he may be presumed to be dead.⁷ The legal presumption of life is sufficient, in the absence of all other evidence, until the lapse of seven years.⁸ The presumption that death occurs at that time fixes the rights dependent on death, until evidence to the contrary appears.⁹

¹ *Graveley v. Graveley*, 25 S. C. 1; 60 Am. Rep. 478; 1 Whart. on Conf. of Laws, §§ 39-52.

² *People v. Platt*, 117 N. Y. 159; 27 N. Y. State Rep. 149.

³ *Pullen v. Monk*, 82 Me. 412; *Penfield v. Cheasapeake, O. & S. W. R. Co.*, 134 U. S. 351.

⁴ *Hymen v. Schlenker*, 44 La. Ann. 108; *Ayers v. Weeks* (N. H.), 18 Atl. Rep. 1108; *First Nat. Bank v. Balcom*, 35 Conn. 357; *Hampden v. Levant*, 59 Me. 559; *The Venus*, 8 Cranch. 253.

⁵ *Hartford v. Champion*, 58 Conn.

268; *Moffett v. Hill*, 131 Ill. 239; *Sesmore v. United States*, 93 U. S. 605; *Bangs v. Brewster*, 111 Mass. 382.

⁶ *Canda v. Robbins*, 55 Hun. 605; 28 N. Y. State Rep. 96.

⁷ *State v. Plym* (Minn.), 45 N. W. Rep. 848; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Spriggs v. Moale*, 28 Md. 497.

⁸ *Cone v. Dunham*, 59 Conn. 145.

⁹ *Whiting v. Nichol*, 46 Ill. 230; *Smith v. Knowlton*, 11 N. H. 191. And see *Presumption of Death*.

XX. MARRIAGE — PROOF OF.

The presumption that a man lives and cohabits with his lawful wife is a disputable one,¹ and the burden of proof is on him who asserts either marriage or the contrary.² It is presumed that every competent couple who lived together ostensibly in the way of husband and wife are such.³ To prove the contract it is sufficient to prove an unconditional agreement of marriage in the present, as distinguished from an executory agreement to marry, if intended by the parties to constitute them husband and wife, though without solemnization.⁴ And proof of cohabitation is not necessary if there be proof of solemnization.⁵ But proof of a contract *per verba de futuro* is not enough, though followed by cohabitation.⁶ But from the fact of solemnization assent is presumed, and any eye-witness may testify to the contract or its solemnization.⁷ It may be also proved by a marriage certificate, if made evidence by statute, or if it is part of the *res gestæ*. It may be also proved by an official registry kept pursuant to statute, or by the registry kept by the officiating clergyman, or by the proper officer of a church or religious society, pursuant to his duty, though without requirement of statute.⁸ Cohabitation and repute is primary evidence of marriage,⁹ but its force depends on its justifying an inference that a contract of marriage was once made. Cohabitation alone, however long continued, is not proof of marriage: there must be something to show that the cohabitation was matrimonial.¹⁰ But proof of cohabitation and that the parties were reputed among friends to be man and wife will suffice, if the reputation be a general one;¹¹ and declarations of either party that they were married is competent against them, and so are the acts and conduct of the parties

¹ United States v. Smith, 5 Utah, 273.

² Erskine v. Davis, 25 Ill. 251.

³ Re Dula's Succession (La. Ann.), 10 S. Rep. 406; State v. Schweitzer, 57 Conn. 532; 1 Bish. on M. & D., § 434.

⁴ Cheney v. Arnold, 15 N. Y. 351; Clayton v. Wardwell, 4 id. 231.

⁵ Caujolle v. Ferrie, 26 Barb. 177.

⁶ Cheney v. Arnold, 15 N. Y. 345. But see 1 Bish. on M. & D., § 251.

⁷ Fleming v. People, 27 N. Y. 329; Bissell v. Bissell, 55 Barb. 325.

⁸ Maxwell v. Chapman, 8 Barb. 579.

⁹ 1 Bish. on M. & D., § 483.

¹⁰ Grimmin's Appeal, 131 Pa. St. 199; Com. v. Stromp, 53 id. 132.

¹¹ Hill v. Burger, 3 Bradf. 459.

toward each other.¹ But they must be reasonably contemporaneous with the cohabitation and repute, so as to characterize it.² The mere continuance of a meretricious cohabitation, even with matrimonial repute, can never amount to evidence of marriage.³

XXI. ISSUE AND LEGITIMACY.

§ 44. **Issue.**—A person will be presumed to be dead without issue after an absence of eighteen years without any intelligence of him or of any issue; and one claiming by collateral descent must show who was the last entitled, and then prove his death without issue. Next prove all the different links in the chain of descent which will show that the claimant descended from the same common ancestor, together with the extinction of all those lines of descent which would take any preference to the claimant.⁴ He must prove the marriages, births and deaths, and identity of persons necessary to fix title in himself, and the extinction of others who would have, if in existence, a better title.⁵ In the absence of evidence the presumption is that a person dying intestate left heirs.⁶

§ 45. **Legitimacy.**—A person born during the continuance of a valid marriage between his mother and any man, or within such time after the dissolution thereof and before the celebration of another valid marriage that his mother's husband could, according to the course of nature, have been his father, is presumed to be the legitimate child of his mother's husband.⁷ Legitimacy is a presumption of law in the absence of competent evidence to the contrary;⁸ and the burden is on the party denying the legitimacy of one shown to have been born from a wife. A child born during a mother's coverture is presumed legitimate, for if there be a possibility of legitimacy the law will not weigh against it the doubt.⁹ Neither husband

¹ Jones v. Gilbert, 135 Ill. 27.

Foster v. Hawley, 8 Hun, 68; Hyde

² Gaines v. New Orleans, 6 Wall. 707; Hayes v. People, 25 N. Y. 396; 1 Bish. on M. & D., §§ 497-506; Matter of Taylor, 9 Paige, 611.

v. Hyde, 3 Redf. 509.

⁴ Abb. Tr. Ev. 85.

⁵ Emerson v. White, 29 N. H. 491; Spriggs v. Moale, 28 Md. 497.

³ Grimmin's Appeal, 131 Pa. St. 199. But see 1 Bish. on M. & D., § 506; O'Gara v. Eisenlohr, 38 N. Y. 296;

⁶ Harvey v. Thornton, 14 Ill. 217.

⁷ Stephen's Ev., art. 98.

⁸ Caujolle v. Ferrie, 23 N. Y. 105.

⁹ Cross v. Cross, 3 Paige, 139.

nor wife is competent either to prove or disprove non-access or non-intercourse, directly or indirectly, even where pregnancy precede marriage.¹ But the declarations of either are competent after his or her death to prove legitimacy or illegitimacy in any mode not involving the question of access.

XVII. HUSBAND AND WIFE.

§ 46. **Title — Law of place.**— The law presumes a loan from the mere fact of the receipt of the wife's money by the husband.² The title of husband and wife to movables is controlled by the law of the place which was their domicile at the time of the acquisition; the validity of their transactions, except as to the realty, by the law either of the place of the transaction, or of the place fixed upon by the contract for its performance, or of their domicile at the time of the transaction.³ The title to realty and the validity of transactions affecting it are controlled by the law of the place where the realty is situated. The form of the remedy and the competency of the evidence are governed by the law of the forum.⁴ The law presumes that the property in the possession of the husband, or husband and wife together, belongs to the husband.⁵ So when she has no separate estate, or where she purchases articles for family use, partly with her own money and partly with his.⁶ But where it is shown that he received the property to his wife's use, or that she had the title, or that it was in her possession, the presumption is that it is hers, though realized by his labor as her servant upon her farm, or in her business, or his skill or ability as her agent in the purchase and resale of her property.⁷

§ 47. **Agency of one for the other.**— A wife has no implied authority, while living with her husband, to bind him in mat-

¹ 1 Taylor's Ev. 837.

² Re Wormley's Estate, 137 Pa. St. 101.

³ Reed v. Reed, 135 Ill. 482.

⁴ Stoneman v. Erie R. Co., 52 N. Y. 429.

⁵ Bucks v. Moore, 36 Mo. App. 529; Stephenson v. Felton, 106 N. C. 114; Schouler's Dom. Rel. 214; 1 Bish.

Mar. W., § 732; Turner v. Brown, 6 Hun, 331; Black v. Nease, 37 Pa. St. 436.

⁶ Glaim v. Younglove, 27 Barb. 480; Kelly v. Drew, 12 Allen, 107.

⁷ Re Wormley's Estate, 137 Pa. St. 101; Hill v. Chamberlain, 30 Mich. 422; Peters v. Fowler, 41 Barb. 467; Albin v. Lord, 39 N. H. 205.

ters not concerning their domestic affairs;¹ and the fact of agency, whether of one for the other, or of a third person for either, is to be proved like other agencies.² The marital relation raises no presumption of agency between them.³ When the agency of the wife is alleged against the husband in matters of a domestic nature, slight evidence of actual authority is enough;⁴ but if his agency is alleged against her to divest her of her estate, strict proof of authority is required.⁵

§ 48. **Wife's title.**—Where personal property is found in the possession of a married woman the presumption of law is that her possession is that of her husband. The law requires the wife in each case to rebut the presumption that whatever she acquires belongs to her husband or is subject to his control.⁶ She must give some evidence of her title besides possession under the marital relation.⁷ She may, however, prove title by adverse possession against a third person, although her husband lived with her.⁸ Evidence that the property came to her from a third person, or a bill of sale running to her individually, is *prima facie* evidence of her title.⁹ She may commence a separate estate or business by a purchase on credit.¹⁰ On the question of title, the declarations of the person who gave her the money with which she purchased the property, and her correspondence with her business agent showing the source of the fund, is competent as part of the *res gestæ*.¹¹ Declarations made by a husband at the time of giving his wife money, as to the purpose for which he gave it, and declarations as to the person for whom he was acting, made when he received a security in her favor, are competent in

¹ Gaffield v. Scott, 40 Ill. App. 380.

² Anderson v. Shiel (Tex.), 18 S. W. Rep. 464; Staker v. Begole (Neb.), 51 N. W. Rep. 468; Bodine v. Killeen, 53 N. Y. 96.

³ Hoffman v. McFadden, 56 Ark.

217.

⁴ Hunt v. Hayes (Vt.), 45 Alb. L. J. 414.

⁵ Schouler's Dom. Rel. 99; Bank of Albion v. Burns, 46 N. Y. 170; Hoffman v. Treadwell, 2 S. C. (T. & C.) 54; 2 Bish. Mar. W., § 407.

⁶ Hemelreich v. Carlos, 24 Mo. App. 264; 2 Bish. Mar. W., § 82; Schouler's Dom. Rel. 16-20.

⁷ Smith v. Abair, 87 Mich. 62; Johnson v. Johnson, 72 Ill. 491.

⁸ Clark v. Gilbert, 39 Conn. 94.

⁹ Aep v. Jacobs (Wyom.), 27 Pac. Rep. 800; Wasserman v. Willett (N. Y.), 10 Abb. Pr. 63.

¹⁰ 2 Bish. Mar. W., § 87.

¹¹ Hannis v. Hazlett, 54 Pa. St. 139; Hall v. Young, 37 N. H. 134; Crain v. Wright, 46 Ill. 107.

favor of her title.¹ To prove a gift by him to her the evidence must be clear.² A mere preponderance of proof is not sufficient as against his creditor.³ The fact that he allows her to deal with property as her own which might be his by marital right does not make it her property.⁴ Thus, a grocery business purchased by a wife with money saved by her, without her husband's knowledge, out of the allowance made her for household expenses, and conducted by her in her own name, is liable for the payment of her husband's debts.⁵ But if he borrows it of her, agreeing to repay it, the agreement is good, and his payment to her is valid as against his creditors.⁶ It seems to be a question of intent.⁷ And where she has a right to her property by law, as if sole, his dealing with it will be presumed to be in the character of agent for her.⁸ To show that she had a separate business, it is not enough to show an isolated transaction, nor several disconnected acts, nor the rendering of domestic service, without evidence that it was intended by her and her husband as a separate business.⁹ The rental of property is not a separate business, but the management of real or personal property for profit is a business.¹⁰

§ 49. **Actions by and against wife.**—A wife may recover for services rendered a third person under a contract made through her husband as manager of the business of such person;¹¹ but a contract by a husband to pay his wife for services is not enforceable.¹² If a married woman brings an action for injuries to her person to recover damages for disqualifica-

¹ Kelly v. Campbell, 2 Abb. Ct. App. Dec. 492; 1 Bish. Mar. W., § 732.

² Id.; Schouler's Dom. Rel. 242; Smith v. Abair, 87 Mich. 62; Rider v. Hulse, 24 N. Y. 372; Shuttleworth v. Winter, 55 id. 629.

³ Wells' Sep. Prop. of M. W. 287-317.

⁴ Yester v. Hochstettler, 4 Wash. 349.

⁵ Aaronson v. McCauley, 19 N. Y. Supp. 690; 46 N. Y. State Rep. 564 (1892).

⁶ Jaycox v. Caldwell, 51 N. Y. 395; Ryder v. Hulse, 24 id. 372.

⁷ 2 Bish. Mar. W., § 446; Schouler's Dom. Rel. 214.

⁸ Houston v. Clark, 50 N. H. 482.

⁹ Porter v. Dunn, 131 N. Y. 314; 43 N. Y. State Rep. 193.

¹⁰ 2 Bish. Mar. W., § 441; Cuck v. Quackenbush, 13 Hun, 107; Smith v. Kennedy, id. 9.

¹¹ Cornelius v. Rieser, 44 N. Y. State Rep. 491 (1892).

¹² Blaechinska v. Howard M. & H. for L. W., 130 N. Y. 497; 42 N. Y. State Rep. 387; Filer v. N. Y. C. R. Co., 49 N. Y. 47.

tion to labor, etc., she must show that she has a separate business, otherwise her husband is entitled to her labor.¹ When she asks to recover for medical attendance, nursing, etc., she must show that she paid them from her separate property.² Where a married woman is sued for a tort, except in regard to her separate estate, she may exonerate herself by showing that it was committed by the coercion of her husband. His direction is not enough; nor is it necessary to show physical compulsion. But she must show the immediate pressure of authority and intimidation. If his presence is shown his command is presumed.³ The presumption of coercion is open to rebuttal.⁴ The fact that a wife lived with her husband three years after executing a deed of her land under his coercion and duress, without saying or doing anything about the matter during that time, is not a ratification of the deed.⁵ To charge her for family necessities purchased by her while living with her husband, it must appear: (1) That the goods were suitable and necessary. (2) That she intended to charge her estate. (3) That the credit was given to her.⁶

§ 50. Actions by and against husband.—The basis of an action by a husband for the alienation of his wife's affections is the loss of the *consortium*, and not the loss of her services;⁷ and proof of adultery is not essential to the maintenance of an action. Where a husband sues for his wife's services, her admission of payment is not generally competent.⁸ Evidence that he knew of and assented to purchases made by her renders him liable therefor.⁹ Thus, the agency of the wife to order, on her husband's credit, articles suitable for herself and family, may be inferred from her being permitted to receive them in his house.¹⁰ But this rule does not make him liable for goods purchased after she has left him without cause, or where she has an adequate income of her own with which

¹ Barnes v. Moore, 86 Mich. 585; Porter v. Dunn, 131 N. Y. 313; 61 Hun, 310; Filer v. New York Central R. Co., 49 N. Y. 47.

² Moody v. Osgood, 59 Barb. 628.

³ Com. v. Munsey, 112 Mass. 289; Reeve, Dom. Rel. 150.

⁴ 2 Whart. Ev., § 1267.

⁵ Thompson v. Thompson (Ind.), 31 N. E. Rep. 529.

⁶ Wells' Sep. Prop. of M. W. 455.

⁷ Adams v. Maine, 3 Ind. App. 232.

⁸ Schouler's Dom. Rel. 112.

⁹ 2 Bish. Mar. W., § 82.

¹⁰ 2 Whart. Ev., § 1256; Ogden v. Prentice, 33 Barb. 160.

she can supply herself.¹ And where he shows that the credit was given against his express orders to plaintiff, the burden is on the plaintiff to show not only that the things furnished were, in their nature, suitable and necessary, but also that the husband neglected his duty to provide supplies, and therefore they were needed in the particular case.²

XXIII. PUBLIC OFFICERS.

§ 51. **Title to office — When strict proof of is necessary.** Though title to an office cannot be determined in a collateral proceeding, sufficient inquiry may be made to determine whether a claimant is or is not a mere intruder.³ Where the issue is directly between the officer and the public, whether in an action by the state, or by or against other public officers, strict proof of title is necessary. Thus, in an action for salary belonging to himself, an officer sues in his individual capacity, and he must prove his regular legal title, and his certificate of election is only *prima facie* evidence of title.⁴ In a prosecution on behalf of the public for refusing to accept office, or to continue its exercise, the best evidence of appointment must be produced.⁵ An officer suing for property as to which his only title is by virtue of his office must show a legal title to the office.⁶ And to charge him with responsibility for a deputy or other subordinate, the appointment must be shown, or that the latter acted as such with his knowledge and assent.⁷ In such cases the certificate of election or commission coming from the proper source is *prima facie* evidence of the party's right to the office; but its existence is not essential unless made so by statute.⁸ In other cases proof of an oral appointment is sufficient.⁹ If the statute requires a written oath to be filed, the taking of the oath cannot be proved in any other manner than by the original

¹ Hunt v. Hayes (Vt.), 45 Alb. L. J. 414.

² Keller v. Phillips, 39 N. Y. 351.

³ United States v. Alexander, 46 Fed. Rep. 728.

⁴ Dolan v. Mayor, etc., 68 N. Y. 278; State v. Smith, 17 R. I. 415.

⁵ Bentley v. Phelps, 27 Barb. 524.

⁶ People ex rel. Henry v. Nostrand, 46 N. Y. 375.

⁷ Sprague v. Brown, 40 Wis. 612; Curtis v. Fay, 37 Barb. 64.

⁸ People ex rel. Babcock v. Murray,

5 Hun, 42.

⁹ Hoke v. Field, 19 Am. Rep. 58.

or a certified copy thereof. Neither the appointment of a deputy nor his relation to his principal can be proved merely by his acts, or his testimony that he acted as such.¹

§ 52. **When strict proof of not necessary.**—(a) As a general rule, proof that a person acted as a certain officer is conclusive of the creation of the office as well as of his election or appointment.² And in actions against public officers it is sufficient in most cases to show either (1) that he was an officer *de facto*, that is, that he acted as such, with color of title; or (2) that he assumed to act as such in the transaction in question, without color of title.³ This is sufficient and conclusive on an issue between third persons, or between them and the officer, or between them and the public.⁴ But a mere intruder who, without color of authority, simply assumes to act as an officer, is not an officer *de facto*, where the public know or ought to know that he is an usurper, and his acts are absolutely void for all purposes.⁵

(b) Where an officer sues by virtue of a process issued to him, possession under it sufficiently proves his authority, if fair on its face, and he need not prove the judgment or order on which it was issued.⁶ And when the officer is sued, the process, if fair on its face, is a protection; and it is not necessary for him to give other evidence of jurisdiction of the person than the production of the process.⁷

(c) A contract made by a public officer within the scope of his authority is presumed to have been made in his official capacity.⁸ But the government is not bound by the act of its officer, unless it appear that he acted within the scope of his authority, or was employed, in his capacity as a public officer, to do the act for it.⁹ The officer is not personally liable if he acted in good faith and within his instructions.¹⁰

¹ Curtis v. Fay, 37 Barb. 67.

² North v. People, 138 Ill. 81.

³ Wilcox v. Smith, 5 Wend. 231; 1 Greenl. Ev., § 92.

⁴ State v. Lewis, 107 N. C. 967; State v. Geer, 48 Kan. 752; Manning v. Weeks, 139 U. S. 504; State v. Carroll, 9 Am. Rep. 409.

⁵ Van Arminge v. Taylor, 108 N. C. 196.

⁶ Clearwater v. Brill, 63 N. Y. 627.

⁷ Chagery v. Jenkins, 5 N. Y. 376;

Russell v. Hubbard, 6 Barb. 654;

Leachman v. Dougherty, 81 Ill. 324.

⁸ Parks v. Ross, 11 How. (U. S.) 362.

⁹ Whiteside v. United States, 93 U. S. 247.

¹⁰ Hall v. Lauderdale, 46 N. Y. 70.

(d) In an action by a public officer founded on his official acts, his own return, if filed in the proper office, is competent *prima facie* evidence in his favor.¹ In a private action against an alleged officer, parol evidence of his official character is admissible notwithstanding there is a record.² That he assumed to act as such officer in the matter is sufficient against him as an estoppel.³

(e) An officer is presumed to have done his duty until the contrary is proved; and the burden of proving affirmatively a breach of official duty is upon the plaintiff, who must show every fact necessary to constitute such breach.⁴

(f) The return of an officer is conclusive as to his acts stated in it within the scope of his duty, as against him and those claiming in privity with him, as evidence in favor of parties who claim an interest or right under the return; and neither the officer nor his deputy can testify in contradiction of it.⁵ But he can show any facts relevant to his defense which are not included in nor contradicted by his return.⁶

(g) Where a return is put in evidence by the officer himself in his own defense, it is not conclusive in his favor. In no case is it evidence in his favor of matters stated as an excuse for non-performance of such official acts as he is by it required to perform.⁷ The return is only conclusive against the officer when it is filed in the office from which it was issued. Prior to such filing it is competent against him as an admission, and, if made in pursuance of duty, is competent in his favor.⁸ If defendant, justifying as an officer, produces the record of his appointment by an authority having apparent jurisdiction, this is conclusive.⁹ He need not prove that the appointing power was *de jure*.¹⁰

¹ Cornell v. Cook, 7 Cow. 310.

⁶ Freeman on Ex., §§ 364-366.

² North v. People, 139 Ill. 81; Dean v. Gridley, 10 Wend. 254.

⁷ Browning v. Hanford, 5 Denio, 586.

³ 1 Greenl. Ev., § 207.

⁸ Nelson v. Cook, 19 Ill. 440; Bechstein v. Sammis, 10 Hun, 585.

⁴ Hartwell v. Root, 19 Johns. 345; Craig v. Adair, 22 Ga. 373; Wilkes v. Dinsman, 7 How. (U. S.) 130.

⁹ State ex rel. Leonard v. Sweet, 27 La. Ann. 541.

⁵ Sheldon v. Payne, 7 N. Y. 453; Armstrong v. Garrow, 6 Cow. 465.

¹⁰ Stevens v. Newcomb, 4 Denio, 437.

XXIV. PARTNERS AND JOINT CONTRACTORS.

§ 53. **Joint contractors.**— In New York an admission made by one joint promisor, although acted on by a third person, does not estop the other promisor, for simple joint contractors are not, like partners, held to be agents for each other.¹ And two or more parties, each of whom acts for himself in producing a result injurious to another, are not jointly liable for the injury.² But in some of the states the rule is that, where several persons are jointly interested in the subject-matter of the suit, the admissions of any one of these persons are receivable against himself and fellows, whether they be all jointly suing or sued, or whether an action be brought in favor of or against one or more of them separately, provided the admissions relate to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.³ As a part of the *res gestae*, joint possession alone may be sufficient to admit evidence of the separate contemporaneous declaration of either possessor, as characterizing the joint possession.⁴ The connection between parties which renders the declarations of one competent against the other cannot be proved by the declaration itself, but it must be separately proved, as the foundation for admitting the declaration. It is in the discretion of the trial court to allow a declaration to be proved first on the promise to connect it afterwards.⁵ It seems, however, that the question of connection is a preliminary question for the court.⁶

§ 54. **Partners — Proof of partnership.**— (1) Actual partnership is the creature of agreement. Without some evidence of the partnership agreement, no partnership in fact can be found to exist.⁷ And though the same strictness of proof is not required to charge defendants as partners as is required to establish the partnership of persons bringing an action, its

¹ Lewis v. Woodworth, 2 N. Y. 513; Shoemaker v. Benedict, 11 id. 176. But see Newman v. Stuckey, 57 Hun, 589; 32 N. Y. State Rep. 876.

² Miller v. Highland Ditch Co., 87 Cal. 430.

³ 1 Tayl. Ev. 655, § 674.

⁴ Dawson v. Callaway, 18 Ga. 373.

⁵ Place v. Minister, 65 N. Y. 89.

⁶ Jones v. Hurlburt, 39 Barb. 403.

⁷ Robinson v. Hope, 102 Mo. 410.

existence cannot be established by such indefinite secondary evidence as general reputation, circumstances, etc.¹

(2) A partnership may be proved by the testimony of a partner, or by that of a witness who has done business with them or for them; and a witness who knows that they have done business as such, at the time in question or other times reasonably proximate, may testify directly to the fact that they were partners, subject, of course, to cross-examination as to the details.² And it is competent to show that one partner introduced the other to the witness as his partner.³

(3) If a written contract sued on runs to the plaintiffs in a firm style, its production is sufficient evidence of the existence of a partnership as against defendants who have signed it.⁴ But it is different where the copartners are defendants. The names of the members must be proved, but slight evidence is enough.⁵ The existence of the firm may be inferred from the agreement of dissolution,⁶ even in transactions as to real property.⁷

(4) It is sufficient to show that a person held himself out or suffered himself to be held out to the world as a partner;⁸ as that hand-bills bearing their names as partners were circulated by the defendant, or that the knowledge that they were so circulated came to the defendant.⁹ But it must appear that the holding out was done by the defendant or by his consent, and it must have been known by the person seeking to avail himself of it.¹⁰

(5) Plaintiff's allegation that defendants were partners is conclusive on them so far as to render evidence of the admissions and declarations of either of them, made while they sustained the relation, competent against all.¹¹ Where a plaintiff deals with a firm on the faith that a person is a partner thereof, he will be liable to such party, though having no in-

¹ *Cooper v. Wood*, 1 Colo. App. 101

² *Gilbert v. Whidden*, 20 Me. 368;
Grew v. Walker, 17 Ala. 824.

³ *Gilbert v. Whidden*, 20 Me. 368.

⁴ *McGregor v. Cleveland*, 5 Wend.
475; *Meyers v. Boyd*, 44 Mo. App. 378.

⁵ *Widdefield v. Widdefield*, 32 Pa.
St. 92.

⁶ *Emerson v. Parsons*, 46 N. Y. 560.

⁷ *Chester v. Dickerson*, 54 N. Y. 1.

⁸ *Elmira Iron & S. Rolling Mill Co.*
v. Harris, 124 N. Y. 280; *Willis v.*
Rector, 50 Fed. Rep. 684.

⁹ *Bennett v. Holmes*, 32 Ind. 108;
Penn v. Kearney, 21 La. Ann. 21.

¹⁰ *Seabury v. Bolles*, 52 N. J. L. 413.

¹¹ *Atherton v. Tilton*, 44 N. H. 452.

terest, if he allowed his name to be held out as such; and a general holding out is enough to raise a legal presumption of partnership, irrespective of whether the representation was brought to the dealer's notice.¹

(6) To charge a dormant partner with the others, the knowledge or ignorance of those dealing with the firm that he was such is wholly immaterial. It is enough to prove that he was actually a partner. But a dormant partner need not give notice of his withdrawal from a partnership in order to relieve himself from liability for subsequent transactions of the firm.² Where defendants represented or conducted themselves as partners, and were trusted as such in the dealing in question, or the one whose relation is contested did so, this is conclusive.³

(7) Where there is *prima facie* evidence of the partnership, or that others were partners with the declarant, his admissions and declarations are competent as against any one of his copartners, whether litigating the case, or not appearing or not even served, whether made to the plaintiff or to a third person, and whether made at or after the transaction in suit, or within a reasonable time before it.⁴

§ 55. Partners — How far liable.— (a) To charge one as a partner he must be shown either to have been a member when the contract sued on was made or the tort committed, or that he had assumed the prior liabilities. It is not sufficient that the person seeking to charge him as such supposed him to be a partner.⁵ It is competent to show its existence prior or subsequent to the time of the transaction in suit, if within a reasonable period.⁶ The commencement of the agency or holding out is *prima facie* evidence of the commencement of the partnership.⁷

(b) The presumption of law is that an incoming partner does

¹ Elmira Iron & S. Rolling Mill Co. v. Harris, 35 N. Y. State Rep. 343; Poillon v. Secor, 61 N. Y. 456. 120 N. Y. 298; Kelly v. Scott, 49 N. Y. 601; Hicks v. Cram, 17 Vt. 449.

² Elmira Iron & S. Rolling Mill Co. v. Harris, 124 N. Y. 280; 35 N. Y. State Rep. 343; Heffner v. Palmer, 67 Ill. 161; Teller v. Patten, 20 How. (U. S.) 125. ⁴ Grafton Bank v. Moore, 14 N. H. 145; Bennett v. Holmes, 32 Ind. 108; Smith v. Collins, 115 Mass. 388.

⁵ Lincoln v. Craig, 16 R. I. 18; Cole v. Butler, 24 Mo. App. 76; Fuller v. Rowe, 57 N. Y. 23.

³ Meriden Nat. Bank v. Gallaudet,

⁶ Fleshman v. Collier, 47 Ga. 253.

⁷ Burns v. Rowland, 40 Barb. 368.

not assume liability for the outstanding debts of the partnership. But if the new firm takes the assets and continues the business in the same place, slight evidence is sufficient to warrant the presumption that it has assumed the liabilities of the old firm.¹

(c) An act of one partner within the scope of the firm business, or incidental thereto, done in the firm name, and not requiring a seal, is binding upon all the partners;² and proof of the existence of the partnership is sufficient evidence of authority.³ And to show the scope of the business, evidence of the previous dealings, the acts of the partners, and of the common usual dealings of persons engaged in the same trade or business at the same locality, is competent.⁴ But the declarations of one partner as to authority, or the scope of business, are not competent as against the other partners.⁵ But upon the question as to whom credit was given, where the partnership has been shown, and the act not beyond its scope, the declaration of any partner, made at the time of the transaction, or during the continuance of the partnership relation, is competent to show that the act was done on behalf of the partnership. It is enough *prima facie* to show that the transaction was in the firm name.⁶

(d) A sealed instrument executed in the name of a firm by one of its members without the proper authority, where a seal is necessary, is the deed of such member only, and he alone is bound by it.⁷ But if the seal is unnecessary, the act will bind the firm as a simple contract, and the seal may be rejected.⁸

(e) The deed of a firm may be ratified by parol.⁹ And the ratification of an act done by one partner beyond the scope

¹ Rickards v. Hene, 30 Neb. 259; Show v. McGregor, 105 Mass. 96.

² Goodman v. Goetz, 36 N. Y. State Rep. 731; Eldridge v. Horgreaves, 30 Neb. 638.

³ Smith v. Collins, 115 Mass. 288.

⁴ North Star Boot & S. Co. v. Stebins (S. D.), 48 N. W. Rep. 833; Story on Part. 202; Clayton v. Hardy, 27 Mo. 536.

⁵ North Star Boot & S. Co. v. Steb-

bins (S. D.), 48 N. W. Rep. 833; Bank of Commerce v. Mayer, 42 La. Ann. 1031; Elliot v. Dudley, 19 Barb. 326.

⁶ Stockwell v. Dillingham, 50 Me. 442.

⁷ Schmetz v. Schreeve, 1 Am. Rep. 439; Gibson v. Warden, 14 Wall. 244.

⁸ Haskinson v. Elliott, 62 Pa. St. 293; Mason v. Breslin, 40 How. Pr. (N. Y.) 436.

⁹ Story on Part. 214.

of his authority may be inferred from circumstances.¹ But knowledge of the act of the partner, without knowledge of the facts making the act a fraud on them, is not enough; so silence and inaction under full knowledge is not enough, unless made so by being known to and acted on by the other party.² But ignorance or innocence is no defense to fraud or deceit committed by one partner in a transaction in the course of the partnership business.³ Though it is otherwise if the act was wholly foreign to the business, yet if the act was incidental to the exercise of an implied power, the receipt of the benefits of it, with knowledge of the facts, is conclusive against them.⁴

§ 56. **Dissolution — Effect of.**— Partners are not agents of each other in transactions relating to the dissolution of the firm.⁵ And as a general rule, the agency of partners for each other terminates with dissolution, and in the absence of special authority or ratification no executory contract or promise by one after dissolution binds the other.⁶ But the collection of debts and the disposal of assets by either general partner, after dissolution, are valid as against the others in favor of third persons.⁷ Except in case of dissolution caused by death, bankruptcy or war, one who defends on the ground of dissolution must prove the dissolution, and notice thereof to the other party.⁸ But it is different where the retiring partner's name was never used, and the plaintiff never knew of his connection with the firm, and he ceased to be a partner before the transaction.⁹ No notice of dissolution is necessary as to those who at or before the time of their transaction did not know of the existence of the partnership,¹⁰ as against those who had previous knowledge of the partnership but

¹ Hayes v. Baxter, 65 Barb. 181.

² Elliott v. Dudley, 19 Barb. 326.

³ Chester v. Dickinson, 54 N. Y. 1;
Stockwell v. United States, 13 Wall.
531.

⁴ Murray v. Binninger, 3 Abb. Ct.
App. Dec. 336.

⁵ Summerlot v. Hamilton, 121 Ind.
87.

⁶ Peyser v. Myers, 45 N. Y. State

Rep. 413; Thompson v. Rowman, 6
Wall. 316.

⁷ Lutterloh v. McIlhenny Co., 74
Tex. 73; Robbins v. Fuller, 24 N. Y.
570.

⁸ Ellison v. Sexton, 105 N. C. 356;
Wade on Notice, 234.

⁹ Elmira Iron, etc. & S. Rolling
Mill Co. v. Harris, 124 N. Y. 280;
Phillips v. Nash, 47 Ga. 218.

¹⁰ Knaus v. Dudgeon, 110 Mo. 58.

had not previously given them credit. But as a general rule constructive or implied notice is necessary as to all persons having no previous dealings with a partnership.¹ Any notice of dissolution given to all who had previously dealt with the firm is sufficient. So is the proper change of the firm name.² So is a notice by advertisement in a newspaper, or any other notice which puts the public on guard.³ But as against those who had given them credit in previous dealings, there must be evidence of actual notice, or something tantamount thereto.⁴

¹ *Joseph v. Southwork F. & M. Co.* 12 N. Y. 283; *Lovejoy v. Spafford*, (Ala.), 10 S. Rep. 327. 93 U. S. 430.

² *Kehoe v. Corville*, 84 Iowa, 415.

⁴ *Austin v. Holland*, 69 N. Y. 571;

³ *Hunt v. Colorado Mill & E. Co.*, 1 Colo. App. 120; *Clapp v. Rogers*, 1 Colo. App. 120; *Deering v. Flanders*, 48 N. H. 225; *Wade on Notice*, 220; *Kennedy v. Atwater*, 77 Pa. St. 34.

CHAPTER XII.

HEARSAY EVIDENCE.

I. OF HEARSAY EVIDENCE.

§ 1. In general.

2. Hearsay — What is — When admissible.

II. MATTERS OF PUBLIC AND GENERAL INTEREST.

3. Public interest — What is.
4. Public and general — Distinction between.
5. What matters involve public or general interest.
6. Rights must be ancient and declarants dead.
7. *Ante litem motam*.
8. *Lis mota* — What is.
9. Declarations *post litem motam*.
10. Witness need not specify from whom he heard.
11. What matters not admissible as hearsay.
12. Particular facts.

§ 13. Maps, documents, etc.

III. HEARSAY AS TO FACTS OF FAMILY HISTORY.

14. In general.
15. Facts that may be proved.
16. By whose declarations proved.
17. Marriage.
18. Family records.
19. Old documents, inscriptions, etc.
20. Declarations of deceased persons.
21. Of other persons, admissible when.
22. Declarations made in view of controversy.
23. When declarant alive.
24. Public records.
25. Recital of public facts in statutes, etc.

I. OF HEARSAY EVIDENCE.

§ 1. In general.— It is a general rule that hearsay evidence is not admissible to establish any specific fact which, in its nature, is capable of being proved by witnesses who speak from their own knowledge;¹ or, in other words, that evidence, whether written or spoken, which does not derive its credibility solely from the credit due to the witness himself, but rests in part upon the veracity and competency of some other person from whom the witness received the information, is not admissible to establish a substantive fact.² And this is

¹Snodgrass v. Caldwell, 90 Ala. 319; Bridgman v. Corey. 62 Vt. 1; 558; 39 N. Y. State Rep. 768. Titterington v. Trees, 78 Tex. 567; Abel v. State, 90 Ala. 631.

the rule although the matter sought to be proved was, at the time it was made, against the interest of the person making it, and although no other evidence can possibly be obtained;¹ as, where it is the declaration of a person who was the only eye-witness and who keeps out of the way to avoid being subpœnaed.² The reason of the rule is, that such evidence requires credit to be given to the statement of a person who is not under the obligation of an oath or any of the ordinary tests for ascertaining the truth of the statement.³ The above rule is subject to many exceptions which are as well established as the rule itself. These exceptions are mainly embraced under the following heads: (1) Admissions by parties in interest. (2) Pedigree. (3) Boundaries. (4) Dying declarations. (5) Relating to matters of general public concern. (6) Declarations or entries made in the course of office or business. (7) Ancient possession. (8) Declarations against interest by person deceased. (9) Testimony given by a witness on a former trial, since deceased.⁴

§ 2. **Hearsay — What is — When admissible.**—The term "hearsay" is used to denote that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person.⁵ Thus, testimony of a witness as to what he has been told, but who knows nothing personally, is mere hearsay;⁶ as, the testimony of a physician, that other physicians concurred with him in his opinion, is hearsay.⁷ So testimony of plaintiff, in an action for breach of promise, that she had heard that defendant was very rich.⁸ It does not follow, because the writing or words in question are those of a third person not under oath, that therefore they are to be considered as hearsay. Thus, where the question is whether the party acted wisely, prudently or in good faith, the in-

¹ *Colle v. McDaniel*, 33 Mo. 363;
Bailey v. Wood, 24 Ga. 164; *Gordon v. Bowers*, 16 Pa. St. 226.

² *Woodward v. Paine*, 15 Johns. 493.

³ *Stevens v. Vrooman*, 16 N. Y. 381;
Cotrell v. Com., 13 Ky. L. Rep. 806;
Mobile & O. R. Co. v. George, 94 Ala. 199.

⁴ 1 Greenl. Ev., § 127.

⁵ *State v. Ah Lee*, 18 Ore. 540; 1 Phil. Ev. 185.

⁶ *Crockett v. Althouse*, 35 Mo. App. 404.

⁷ *Hussey v. State*, 87 Ala. 121.

⁸ *Totten v. Read*, 32 N. Y. State Rep. 46.

formation on which he acted, whether true or false, is original and material evidence. So are replies given to inquiries made at the residence of an absent witness, and all other communications, whenever the fact that such communication was made, and not its truth or falsity, is the point in controversy.¹ Evidence of general reputation, reputed ownership, public rumor, general notoriety, and the like, though composed of the speech of third persons not under oath, is original evidence and not hearsay. But hearsay evidence, though it may tend to prove good faith in the transaction which is the subject-matter of the suit, is not competent for any purpose;² as that a debtor has left the state.³ So the reputed influence of one man over another.⁴ So testamentary capacity cannot be proved by rumors.⁵ The declarations of a deceased person are admissible only as to those things to which he could testify if sworn in the case, and should state facts and not conclusions.⁶ But the fact that declarations, if true, would bear upon the rights of third persons, cannot exclude them if otherwise competent.⁷

II. MATTERS OF PUBLIC AND GENERAL INTEREST.

§ 3. **Public interest—What is.**—Declarations are generally deemed to be competent when they relate to the existence of any public or general rights or custom, or matter of public or general interest. Hearsay evidence is admissible as to questions relating to matters of public and general interest.⁸ The term "interest" means pecuniary interest, and the grounds of admissibility are, that as the origin of such rights are generally ancient and obscure they are usually incapable of direct proof, and because, as to local matters, all persons living in the neighborhood and interested in them are likely to be conversant, and thus a trustworthy reputation may arise from the concurrence of many unconnected with each other and interested in investigating the truth.⁹

¹ 1 Greenl. Ev., §§ 98, 99; Hill v. Rep. 74; State v. Elkins (Mo.), 14 S. North, 34 Vt. 604. W. Rep. 116.

² De Ford v. Orvis, 42 Kan. 302.

⁷ Jacobs v. Callaghan, 57 Mich. 11.

³ Tucker v. Wilkins, 105 N. C. 272.

⁸ Weeks v. Sparke, 1 M. & S. 690;

⁴ State v. Evans, 33 W. Va. 417.

Morewood v. Wood, 14 East, 329.

⁵ Thompson v. Ish, 99 Mo. 160.

⁹ 1 Greenl. Ev., § 128; Rex v. Bedfordshire, 4 E. & B. 541.

⁶ Egan v. Green (Mich.), 45 N. W.

§ 4. **Public and general — Distinction between.**— A right is public if it is common to all citizens; and declarations as to public rights, if they were made before the question in relation to which they are to be proved has arisen, are competent, whoever made them.¹ Mr. Greenleaf says: "The terms 'public' and 'general' are sometimes used as synonymous, meaning merely that which concerns a multitude of persons.² But in regard to the admissibility of hearsay testimony, a distinction has been taken between them; the term 'public' being strictly applied to that which concerns all the citizens and every member of the state, and the term 'general' being referred to a lesser though still a large portion of the community."³ "In matters of public interest all persons must be presumed conversant, on the principle that individuals are presumed to be conversant in their own affairs; and as common rights are naturally talked in the community, what is thus dropped in conversation may be presumed to be true. It is the prevailing current of assertion that is resorted to as evidence; for it is to this that every member of the community is supposed to be privy and to contribute his share. In matters strictly public—such, for example, as a claim of highway, or a right of ferry,—reputation from any one appears to be receivable. If, however, the right in dispute be simply general—that is, if those only who live in a particular district are interested in it,—hearsay from persons wholly unconnected with the place of business would be not only of no value but probably altogether inadmissible. Evidence of common reputation is therefore received in regard to public facts on grounds similar to that on which public documents not judicial are admitted; namely, the interest which all have in their truth and the consequent probability that they are true."⁴ Thus, where many persons have a right of common in land, evidence of reputation as to the rights of one is admissible, provided it is derived from persons conversant with the neighborhood. Mr. Greenleaf says: "It appears, therefore, that competent knowledge in the declarant is, in all cases, an essential prerequisite to the admission of his testimony; and that though all the citizens are presumed to have that knowledge in some

¹ 1 Greenl. Ev., § 128.

² Pim v. Currell, 6 M. & W. 234.

³ 1 Greenl. Ev., § 128.

⁴ 1 Starkie, Ev., § 195.

degree, where the matter is of public concernment, yet in other matters, of interest to many persons, some particular evidence of such knowledge is required.”¹

§ 5. What matters involve public or general interest.—Hearsay has been admitted where the question related to a right of common;² a parochial;³ a manorial custom;⁴ a custom of mining in a particular district—the limits of a town;⁵ the boundaries between counties, parishes, hamlets or manors;⁶ or between old and new land in a manor;⁷ a claim of tolls on a public road, the fact whether a road was public or private;⁸ a prescriptive liability to repair sea-walls⁹ or bridges;¹⁰ a claim of highway;¹¹ the fact whether land on a river was a public landing-place or not;¹² the jurisdiction of a court; or the existence of a manor.¹³ But while general reputation is evidence, the tradition of a particular fact is not. In order to admit reputation it is not necessary that the user should be shown, but such evidence without user is entitled to but little weight.

§ 6. Rights must be ancient and declarants dead.—Statements as to matters of general public history made in accredited historical books—by authors deceased or out of the reach of process of court—are held to be competent when the occurrence of any such matter is in issue or relevant to the issue. A party relying upon historical facts must produce some evidence thereof to the jury. It seems that no historical work can be read in evidence while its author is living and might be called as a witness. A local history, it seems, is not admissible evidence. To warrant its introduction it must relate to such facts as are of a public nature and of interest to the whole state.¹⁴ Reputation, tradition, or hearsay, as it may properly be called, is from necessity admissible to prove historical facts of former ages, about which no contemporaneous living person can testify. Mr. Greenleaf says: “The law allows them to be proved by general reputation; that is, by the

¹ 1 Greenl. Ev., § 129.

² Weeks v. Sparke, 1 M. & S. 679.

³ Mosely v. Davies, 11 Price, 162.

⁴ Doe v. Sisson, 12 East, 62.

⁵ Davies v. Morgan, 1 C. & J. 587.

⁶ Nicholls v. Parker, 14 East, 331.

⁷ Barnes v. Mawson, 1 M. & S. 81.

⁸ Rex v. Bliss, 7 Ad. & El. 555.

⁹ Rex v. Leigh, 10 Ad. & El. 398

¹⁰ Rex v. Sutton, 8 A. & E. 516.

¹¹ Reed v. Jackson, 1 East, 355.

¹² Drinkwater v. Porter, 7 C. & P. 181.

¹³ Steel v. Prickett, 2 Stark. 466.

¹⁴ McKinnon v. Bliss, 21 N. Y. 206.

declarations of deceased persons, who may be presumed to have competent knowledge on the subject.¹ It is to be observed that the exception we are now considering is admitted only in the case of ancient rights, and in respect to the declarations of persons supposed to be dead.”² It is required by the nature of the rights in question; their origin being generally antecedent to the time of legal memory, and incapable of direct proof by living witnesses both from this fact and from the undefined generality of their nature.

§ 7. *Ante litem motam*.—Mr. Greenleaf says: “Another important qualification in the admission of reputation is that the declaration so received must have been made before any controversy arose touching the matter to which it relates; as it is usually expressed, *ante litem motam*. The ground on which such evidence is admitted at all is, that the declarations ‘are the natural effusion of a party, who must know the truth, and who speaks without any temptation to exceed or fall short of the truth.’³ But no man is presumed to be thus indifferent in regard to matters in actual controversy; for when the contest has begun, people generally take part on the one side or the other; their minds are in a ferment, and, if they are disposed to speak the truth, facts are seen by them through a false medium; consequently all *ex parte* statements, whether under oath or not, are rejected if they were made subsequently to the date of the controversy.”⁴

§ 8. *Lis mota* — What is.—Mr. Greenleaf says: “The *lis mota*, in the sense of our law, carries with it the further idea of a controversy upon the same particular subject in issue. For, if the matter under discussion at the time of trial was not in controversy at the time to which the declarations offered in evidence relate, they are admissible, notwithstanding a controversy did exist upon some other branch of the general subject.⁵ The value of general reputation as evidence of the true state of facts depends upon its being the concurrent belief of minds unbiased and in a situation favorable to a

¹ Crease v. Barrett, 1 C., M. & R. 919. v. Baker, 13 Ves. 514; Taylor on Ev., § 628.

² 1 Greenl. Ev., § 130; Davis v. Fuller, 12 Vt. 178.

³ 1 Greenl. Ev., § 131; Whitelocke

⁴ 1 Greenl. Ev., § 131; Richards v. Bassett, 10 B. & C. 160.

⁵ 1 Greenl. Ev., § 163.

knowledge of the truth, and referring to a period when this fountain of evidence was not rendered turbid by agitation. But the discussion of other topics, however similar in their general nature, at the time referred to, does not necessarily lead to the inference that the particular point in issue was also controverted, and therefore is not deemed sufficient to exclude the sort of proof we are now considering.”¹

§ 9. Declarations post litem motam.—Mr. Greenleaf says: “Declarations made after the controversy has originated are excluded, even though proof is offered that the existence of the controversy was not known to the declarant. The question of his ignorance or knowledge of this fact is one which the courts will not try; partly because of the danger of an erroneous decision of the principal fact by the jury, from the raising of many collateral issues, thereby introducing great confusion into the cause; and partly from the fruitlessness of the inquiry, it being from its very nature impossible in most cases to prove that the existence of the controversy was not known. The declarant in this case is always absent, and generally dead.”²

§ 10. Witness need not specify from whom he heard.—Mr. Greenleaf says: “Where evidence of reputation is admitted, in cases of public or general interest, it is not necessary that the witness should be able to specify from whom he heard the declaration. For that, in the much greater number of cases, would be impossible.”³

§ 11. What matters not admissible as hearsay.—Reputation is not admissible to show: What were the boundaries between two private estates;⁴ or whether a party had a private right of way over a particular field;⁵ whether the plaintiff was exclusive owner of the soil, or had a right of common only.⁶ The want of competent knowledge in the declarant is the reason assigned for rejecting evidence of reputation of common fame in mere matters of private right. Evidence of general reputation, upon general points, is receivable, because, all mankind being interested therein, it is natural to

¹ Id.; *Freeman v. Phillip*, 4 M. & S. 486.

² 1 Greenl. Ev., § 133.

³ 1 Greenl. Ev., § 135.

⁴ *Clothier v. Chapman*, 14 East, 331.

⁵ *Blockett v. Lowes*, 2 M. & S. 494.

⁶ *Richards v. Bassett*, 10 B. & C. 663.

suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information.

§ 12. **Particular facts.**—Declarations as to particular facts, from which the existence of any public or general right or custom, or matter of public or general interest, may be inferred, are not competent. Thus, reputation as to particular facts is inadmissible. The question of the admissibility of this sort of evidence turns upon the nature of the reputed fact — whether it was interesting to one party only, or to many. But if it had no connection with the exercise of any public right, nor the discharge of any public duty, nor with any other matter of general interest, it falls within the general rule by which hearsay evidence is excluded.

§ 13. **Maps, documents, etc.**—Documentary and all other kinds of proof denominated hearsay are admissible, as the medium of proving traditionary reputation in matters of public and general interest. Mr. Greenleaf says: "If the matter in controversy is ancient and not susceptible of better evidence, any proof in the nature of traditionary declarations is receivable, whether it be oral or written, subject to the qualification above stated. Thus deeds, leases and other private documents are admitted as declaratory of the public matters recited in them.¹ Maps also showing the boundaries of towns and parishes are admissible, if it appear that they have been made by persons having adequate knowledge."² So they are of private premises.³ A map one hundred years old, made by the official surveyor through a farm, is evidence of the width of the highway through the adjacent farm;⁴ so are plans of the premises properly identified;⁵ so is an unrecorded plan, referred to in a recorded deed, when properly identified;⁶ so is an unrecorded plat of an addition to prove location and identity.⁷ Field-notes are admissible to locate a beginning cor-

¹ *Claxton v. Dare*, 10 B. & C. 17.

² 1 *Greenl. Ev.*, § 139; *Noyes v. White*, 19 Conn. 250; *Auers v. Watson*, 137 U. S. 584; *Hargro v. Hodgdon*, 89 Cal. 623.

³ *Rowland v. McCown*, 20 Oreg. 538.

⁴ *Blackman v. Reilly*, 52 N. Y. State

Rep. 865; 138 N. Y. 318; *Chicago, M. & St. Paul R. Co. v. McArthur*, 53 Fed. Rep. 464.

⁵ *McVey v. Durkin*, 136 Pa. St. 418.

⁶ *Weld v. Brooks*, 152 Mass. 297.

⁷ *Lute v. Compton*, 77 Wis. 587; *Atwood v. Canrike*, 86 Mich. 99; *Reed v. Murry* (Cal.), 24 Pac. Rep. 841.

ner.¹ Maps or plats of premises alleged to have been damaged, identified by witnesses and shown to be substantially correct, are properly submitted to the jury to be considered in connection with other evidence.² So is a rough-draft sketch of property injured, made by a witness testifying in relation to the condition and situation of the property after the injury.³

III. HEARSAY AS TO FACTS OF FAMILY HISTORY.

§ 14. **In general.**—Mr. Stephen, in his Digest of the Law of Evidence,⁴ says: “As a general rule, where pedigree is directly in issue, the declarations of a person shown to be legitimately related by blood to the person to whom they relate, or by the husband or wife of such person, if made before the question in relation to which they are to be proved has arisen, are relevant as to the existence of any relationship between persons, whether living or dead, or to the birth, marriage or death of any person by which such relationship was constituted, or to the time or place at which any fact occurred, or to any fact immediately connected with its occurrence. Such declarations may express either the personal knowledge of the declarant, or information given to him by other persons qualified to be declarants. They may be made in any form, and in any document, or upon anything in which statements as to relationship are commonly made.”

Hearsay evidence is admitted to prove facts of family history upon the ground of necessity, and upon the obvious difficulty of tracing descent and relationship of deceased members of families by any other evidence. The law will receive the natural effusions of a party, who knew the truth, and who spoke upon an occasion where his mind stood in an even position, without any temptation to exceed or fall short of the truth. The value of such evidence is enhanced in proportion as it relates to long past occurrences, other evidence of which is impaired or lost by lapse of time;⁵ in proportion, too, as it consists of contemporaneous declarations or records formally

¹ *Irvin v. Bevil*, 80 Tex. 332.

Co. (Ill.), 24 N. E. Rep. 522; *Griffith*

² *Kankakee & S. R. Co. v. Horan*,

v. Rife, 72 Tex. 185.

131 Ill. 288.

⁴ Art. 31.

³ *Brown v. Galesburg, P. B. & T.*

⁵ *Stouvenal v. Stephens*, 26 How. Pr. (N. Y.) 244.

or solemnly made by persons naturally cognizant of the facts, and who would have no motive to misrepresent;¹ and in proportion as those from whom it proceeded bore such relation as created an interest to ascertain and perpetuate the truth;² and, if consisting of an oral declaration, by the naturalness of the circumstances which lead to its being made; and, if consisting of records, in proportion as they have been public, open, and well known to the family.³ At best it is weak evidence.⁴ Any declarations, in order to be received, must have been made *ante litem motam*, and after the death of the declarant.⁵

§ 15. **Facts that may be proved.**—The facts of family history which may be proved by hearsay from proper sources are: Relationship generally,⁶ its degree,⁷ birth,⁸ death,⁹ marriage,¹⁰ issue or want of issue,¹¹ living or survival,¹² relative age or seniority, name and the place of residence.¹³

As a general rule, the date of a person's birth may be testified to by himself or by members of his family, although they know the fact only by hearsay based on family tradition.¹⁴ The declarations of a deceased person as to the genealogy of a family, relating to events which occurred in a foreign country, are admissible in evidence, after so great a lapse of time that strict proof cannot be adduced, upon slight proof that the declarants were members of a family to which their declarations relate.¹⁵ In an action by one claiming to be the son of a decedent to recover lands left by such decedent, the plaintiff may show by witnesses that such decedent had said that he was married and had a wife, and named plaintiff's

¹ *Caujolle v. Ferrie*, 23 N. Y. 90-94.

² *Walker v. Wingfield*, 18 Ves. 511.

³ *North Brookfield v. Warren*, 16 Gray, 174.

⁴ *Morewood v. Wood*, 14 East, 330.

⁵ *Hodges v. Hodges*, 106 N. C. 374; *State v. Parker*, id. 711.

⁶ *Backdahl v. Grand Lodge A. O. U. W.*, 46 Minn. 61; *Louder v. Schultzer*, 78 Tex. 103.

⁷ *Ewbb v. Richardson*, 42 Vt. 465.

⁸ *American L. Ins. Co. v. Rosendale*, 77 Pa. St. 507.

⁹ *Masons v. Fuller*, 45 Vt. 29.

¹⁰ *Caujolle v. Ferrie*, 23 N. Y. 90; *Eisenlord v. Clum*, 126 id. 552; 38 N. Y. State Rep. 446; 44 Alb. L. J. 66; *Bell v. Bumstead*, 60 Hun, 580; 38 N. Y. State Rep. 393.

¹¹ *People v. Fulton F. Ins. Co.*, 25 Wend. 208.

¹² *Johnson v. Pembroke*, 11 East, 504.

¹³ *Cuddy v. Brown*, 78 Ill. 415.

¹⁴ *Houldon v. Manteufel* (Minn.), 53 N. W. Rep. 541.

¹⁵ *Re Robb's Estate*, 37 S. C. 19.

mother, and that he had an heir—a son. It seems that if the alleged declaration of marriage was made before the plaintiff's birth it would tend to prove plaintiff's legitimacy. The exception regarding the admission of hearsay evidence in case of pedigree is not confined to ancient facts, but extends also to matters of pedigree which have recently transpired; and the hearsay as to deceased witnesses is admitted as to facts which have occurred in the presence of living witnesses.¹

§ 16. By whose declarations proved.—The hearsay must be from persons having such a connection by blood or marriage with the party to whom it relates that it is natural and likely from their domestic habits and connections that they are speaking the truth and are not mistaken. It must appear that the declarant or source of the witness' information was a deceased member of the family, legally related by blood or marriage to the family whose history the fact concerns.² But in *Backdahl v. Grand Lodge A. O. U. W.*³ it is held that relationship may be proved by one acquainted with the family, and who knows that the person was recognized by it as a relative. The general rule, however, is that the witness must name the source of information,⁴ and show affirmatively that it was a relative or connection,⁵ who is since deceased.⁶ It is enough to show that the declarant was connected with the family, without proving him to be a connection of the person whose connection with the family is to be established.⁷ And, conversely, relationship of the declarant with the particular person is sufficient to admit his declarations of the relationship of that person to the family. But his relationship to one or the other must be established by other evidence than the declarations themselves.⁸ And this is a preliminary question for the judge;⁹ and slight evidence that the declarant was connected, even without showing the precise degree of relationship, seems to be sufficient.¹⁰ Thus,

¹ *Eisenlord v. Clum et al.*, 126 N. Y. 552; 38 N. Y. State Rep. 452.

² *Emerson v. White*, 29 N. H. 491; 1 *Taylor on Ev.*, §§ 569-571; *Doe v. Randall*, 2 *Moore & P.* 20.

³ 46 *Minn.* 61.

⁴ *Scott v. Ratcliffe*, 5 *Pet.* 81.

⁵ *Chapman v. Chapman*, 2 *Conn.* 347; *Waldron v. Tuttle*, 4 *N. H.* 371.

⁶ *Greenleaf v. Dubuque, etc.* R. R. Co., 30 *Iowa*, 301.

⁷ *Monkton v. Attorney-General*, 2 *Russ. & M.* 156.

⁸ *Blackburn v. Crawford*, 3 *Wall.* 187.

⁹ *Doe v. Davis*, 10 *Q. B.* 323.

¹⁰ 1 *Taylor on Ev.*, § 573.

to prove a marriage for the purpose of legitimating the issue as heirs of the alleged husband, evidence of a declaration of a relative of the woman is not competent in the first instance, because the declarant must first be shown to be connected with the family of the man.¹ Where the whole evidence is traditionary, when it consists entirely of family reputation or statements of declarations made by persons who died long ago, it must be taken with such allowance and also with such suspicions as ought reasonably to be attached to it. To prove who was the mother of the child, the declarations of a father in reference thereto may be received.² So, too, the declarations of a mother in reference to the paternity of her son may be given in evidence;³ so the declarations of any deceased person as to whom were his or her heirs.⁴ A man's declarations that he is married and that a certain child is his son and heir, although not admissible to prove marriage as part of the *res gestæ*, when he never lived or cohabited with the alleged wife and never had anything to do with her son, are admissible as hearsay evidence concerning pedigree on the question of the legitimacy of the son.⁵ Declarations of a deceased person are admissible to prove the relationship of such person to another who is also deceased.⁶ A minor may testify to his own age according to the reputation in the family.⁷ But testimony of one as to the age of another upon information from the latter's sister is inadmissible where it is not shown that the sister is dead;⁸ it must also first affirmatively appear that the declaration was made *ante litem motam*.⁹

§ 17. **Marriage.**—The declarations of deceased members of a family in reference to marriage are admissible; but where the marriage is essential to be established as a substantive fact, it cannot be established by such declarations.¹⁰ In some

¹ Blackburn v. Crawford, 3 Wall. 187.

² United States v. Saunders, 1 Humph. (Tenn.) 483.

³ Caujolle v. Ferrie, 26 Barb. 177.

⁴ Moffit v. Witherspoon, 10 Ired. (N. C.) 185.

⁵ Eisenlord v. Clum, 126 N. Y. 552; 38 N. Y. State Rep. 446. Bell v. Bumstead, id. 393; 60 Hun, 580.

⁶ Louder v. Schluter, 78 Tex. 103.

⁷ State v. Best, 108 N. C. 747.

⁸ State v. Parker, 106 N. C. 711.

⁹ Hodges v. Hodges, 106 N. C. 374.

But see Eisenlord v. Clum et al., 38 N. Y. State Rep. 452.

¹⁰ Westfield v. Warren, 8 N. J. L. 249.

states, however, it is proper to prove the marriage of parties by proving cohabitation.¹ So it is competent to prove, by the declarations of the parents of a child, whether they were married when the child was born.² But such evidence is not admissible to prove that children born in wedlock are illegitimate by reason of non-access.³ Such evidence is admissible to prove whom a man married or whom a woman married, what children they had, and whether legitimate or illegitimate.⁴

§ 18. Family records.— Entries of births, deaths and marriages in the family Bible, or other book or memorandum-book, are admissible in evidence on the ground that, being in that place, they are to be taken as assented to by those having the custody of the book.⁵ So entries in a hymn-book,⁶ and a chart or genealogical table preserved as such in the family.⁷ A pedigree which has long hung up in a family mansion is good evidence in such cases,⁸ or a marriage certificate kept by the family.⁹ So a minute-book of visitation signed by the heads of the family.¹⁰ So a paper in the handwriting of a deceased member of the family purporting to give a genealogical account of the family.¹¹ And so is almost any document which, even though not evidence in its own character, has been preserved as a memorial by the family, such as a transcript of a parish register. So a ring worn publicly, stating the date of the person's death whose name is engraved upon it.¹² Except in case of a tombstone inscription or entries in a family Bible, the entries must be proved to have been made by a deceased member of the family,¹³ or that they had been treated in the family as containing a family record.¹⁴ The handing down of the record in the family may be proved by oral declarations of members of the family.¹⁵

¹ O'Hara v. Eisenlohr, 38 N. Y. 296.

² Eisenlohr v. Clum, 126 N. Y. 552.

³ Corrie v. Cummings, 26 Ga. 690.

⁴ Corrie v. Cummings, 26 Ga. 690; Wood's Prac. Ev., § 94.

⁵ Lewis v. Marshall, 5 Pet. 470.

⁶ Collins v. Grantham, 12 Md. 440; Dobson v. Cothran, 34 S. C. 518.

⁷ Northbrookfield v. Warren, 16 Gray, 171.

⁸ Goodright v. Moss, Cowp. 594.

⁹ Jenkins v. Davis, 10 Q. B. 314.

¹⁰ Pitton v. Walker, 1 Str. 162.

¹¹ Monkton v. Attorney-General, 2 Russ. & My. 147.

¹² Collins v. Grantham, 12 Ind. 440.

¹³ Hubback, Ev. of Suc. 673.

¹⁴ Hood v. Beauchamp, 8 Sim. 29.

¹⁵ Doe v. Davies, 10 Q. B. 324.

§ 19. **Old documents, inscriptions, etc.**—Wood, in his Practice Evidence, says: “Recitals in old deeds are evidence.¹ So are other statements in an instrument executed by a member of the family, since deceased, such as a will recognizing children,² or inscriptions on old gravestones. So a register of births and marriages kept in the records of a town.³ Letters purporting to have come from the deceased, and containing declarations as to facts of his family history, are competent if proved to be in his handwriting. The envelopes, if existing, should be produced. So statements in old wills bearing upon questions of pedigree or relationship, although the will is canceled and never was operative, but which was found among the papers of the testator, a deceased member of the family, whose pedigree is in question, is admissible. In case of a loss of an ancient instrument, the record or probate, with appropriate evidence to identify it as a family or public memorial, is competent. So depositions of deceased witnesses, used in a case between other parties, are admissible upon a question of pedigree, whether taken before or after the litigation commenced in which the question of pedigree is involved.⁵ Coat-armour and mural inscriptions, giving an historical account of a family, placed in a chancel which was formerly used as a burial place for the family, located in a parish where the family were long resident proprietors, are admissible. So memoranda in an almanac, a prayer-book, as well as entries in any other documents, books or papers, kept in and accessible to the family, are admissible.”⁶

§ 20. **Declarations of a deceased person.**—Wood, in his Practice Evidence, says: “The memoranda of a parent are good evidence to prove the time of the birth of a child;⁷ but not as to the place of birth.⁸ An inscription on a tombstone, stating the age of a party, is admissible.⁹ So an old tracing from an effaced monument.¹⁰ So a bill in chancery by a father stating his pedigree.¹¹ An answer in chancery, sworn *ante*

¹ Little v. Palister, 4 Me. 209.

² Russell v. Jackson, 22 Wend. 276.

³ Miner v. Boneham, 15 Johns. 226.

⁴ Hunt v. Johnson, 19 N. Y. 279.

⁵ Peake's Ev. 24.

⁶ Wood, Prac. Ev., §§ 93, 94, 95.

⁷ Brunce v. Roulings, 7 East, 290.

⁸ Rex v. Erith, 8 East, 542.

⁹ Kidney v. Cockburn, 2 Russ. & My. 167.

¹⁰ Slaney v. Wade, 7 Sim. 595.

¹¹ Taylor v. Cole, 7 T. R. 3.

litem motam, is evidence of pedigree set forth in it. Declarations of the kind above described are strictly admissible only in inquiries relating to descent or relationship, or in tracing the devolution of property. Some facts of family history, such as deaths, issue or failure of issue, kinship, name and marriage, may be proved by general reputation in the family, upon the testimony of a witness whose knowledge of that repute and of the conduct of members towards each other is that which usually exists among intimate acquaintances."¹

§ 21. **Of other persons, admissible when.**—Declarations of a deceased person as to her own legitimacy are evidence. So of a deceased husband as to the legitimacy of his wife, and as to the pedigree of her family.² So the declarations of a wife as to her husband's family,³ but not the declarations of her husband's father, nor the declarations of illegitimate relations.⁴ The declarations of servants and intimate acquaintances are not admissible. But general repute among one's acquaintances that he had died is competent, either when he left no kindred,⁵ or in connection with family repute when he died abroad.⁶ In the absence of any direct evidence, the testimony of those who naturally would be likely to hear of the absentee, if living, such as one residing near the estate of a tenant for life, though not a member of the family, that he had not been heard of for years, is competent.⁷ The fact that insurers have paid a loss upon a vessel not heard from is received as relevant to the presumption of death of one on board; but mere memoranda, though found in official record books, are not competent.⁸ Public histories, biographies and other compilations are some evidence of the facts they recite.⁹

§ 22. **Declarations made in view of controversy.**—If it appears by either the declaration itself, or other evidence, that at the time the declaration was made, a discussion and controversy had arisen as to the fact of family history sought

¹ Wood's Prac. Ev., § 93; Eaton v. Tallmadge, 24 Wis. 217; Vial v. Smith, 6 R. I. 419; Spears v. Burton, 31 Miss. 547.

² Vowles v. Young, 13 Ves. 148.

³ Shrewsbury Peerage, 7 H. L. C. 1.

⁴ Bamford v. Barton, 2 M. & Rob. 28.

⁵ Ringhouse v. Keever, 49 Ill. 470.

⁶ Ewing v. Savory, 3 Bibb, 235.

⁷ Flynn v. Coffee, 12 Allen, 133.

⁸ Ridgeley v. Johnson, 11 Barb. 527.

⁹ Russell v. Jackson, 22 Wend. 276.

to be proved, the declaration is incompetent.¹ It is the beginning of a dispute, involving the very point in question, not that of the state of facts from which the dispute sprang, nor that of resulting litigation, which determines the competency. It makes no difference that the dispute was raised for the purpose of excluding declarations, or that the existence of the dispute was unknown to the declarant, and declarations made for the purpose of evidence would not be competent.²

§ 23. **When declarant alive.**—Oral declarations, family records and other documents of the nature of hearsay are equally primary, but the competency of each depends not on entire absence of mere satisfactory evidence, but on the death of the declarant; and if he is alive and within the reach of process, the declaration, whether oral or written, is incompetent,³ except as against him or those claiming under him, or by way of corroboration of testimony given by the declarant as a witness.

§ 24. **Public records.**—An entry in any record, official book, or registry in any state or at sea, or in any foreign country, stating a fact in issue or relevant, or deemed to be relevant thereto, and made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which such record, book or register is kept, is itself deemed to be a relevant fact.⁴ Thus, official registers and records kept by public officers, in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation, are admissible in evidence.⁵ So a private record of marriage kept in a book by a deceased clergyman is admissible in evidence upon proof that the entries are in his handwriting.⁶ Thus, a register kept without authority of law is competent in evidence of the main fact, whether of marriage, baptism or burial, and of its date, but not of other facts stated in it.⁷ But to admit

¹ *Hodges v. Hodges*, 106 N. C. 374; *Elliott v. Piersol*, 1 Pet. 337.

² *Chapman v. Chapman*, 2 Conn. 347.

³ *State v. Parker*, 106 N. C. 711.

⁴ *Evanston v. Gunn*, 99 U. S. 660; *1 Greenl. Ev.*, §§ 483, 484, 485, 493.

⁵ *United States v. Cross*, 20 Wash. L. Rep. (D. C.) 98; *Scot v. Choep*, 33 Neb. 41; *Hoganspon v. Shirk*, 129 Ind. 352.

⁶ *Johnson v. Coiadrey*, 46 N. Y. State Rep. 546.

⁷ *Bowis v. Marshall*, 5 Pet. 470.

it, it must appear that it was kept by the proper officer or by the officiating clergyman, pursuant to his duty or in the usual course of its functions, and that he is since deceased.¹ It should also appear that the registry is produced from the custody of his successor, the entry being in his own handwriting, and appearing to have been made contemporaneous with the performance of the right, and before controversy arose, with no apparent inducement to mistake nor interest adverse to his official duty.²

§ 25. **Recital of public facts in statutes, etc.**—When any act of state or any fact of a public nature is in issue, or is, or is deemed to be, relevant to the issue, any statement of it made in a recital contained in any public statute or in any public proclamation, or any message of an executive to the legislature or in any legislative resolution, is deemed to be a relevant fact.³

¹ Doe v. Andrews, 15 Q. B. 758.

Radcliff v. United Ins. Co., 7 Johns.

² Kennedy v. Doyle, 10 Allen, 161.

51; Armstrong v. United States, 13

³ Gregg v. Forsyth, 24 How. (U. S.) Wall. 154.

179; Bryan v. Forsyth, 19 id. 334;

CHAPTER XIII.

HEARSAY EVIDENCE (CONTINUED).

I. OF ANCIENT POSSESSION.

- § 1. In general.
- 2. Declarations accompanying possession.
- 3. Private titles—Hearsay not admissible as to.
- 4. Maps.
- 5. Perambulations.
- 6. Modern exercise of right.
- 7. Private boundaries—Hearsay to establish.
- 8. Deceased surveyors—Declarations of.
- 9. Owner's declarations.

II. DYING DECLARATIONS.

- 10. In general.
- 11. To material matters only.
- 12. Declarations must be complete.
- 13. Weight to be given dying declarations.

III. DECLARATIONS AGAINST INTEREST.

- 14. In general.
- 15. Conditions precedent to admission.
- 16. Admissions of deceased grantor.
- 17. Declarations of decedent against his representatives.
- 18. Declarations of testator as to contents of lost will.
- 19. Donor.

IV. MEMORANDA.

- 20. Entries by public officer from reports by other officers.

V. SHOP-BOOKS, ACCOUNT-BOOKS, ETC.

- § 21. In general.
- 22. Time of entry material, when.

VI. MEMORANDA AS EVIDENCE.

- 23. In general.
- 24. Refreshing memory by.
- 25. When memoranda must be made by witness.
- 26. When witness need not have recollection independent of memorandum.
- 27. Memoranda primary evidence when.

VII. EVIDENCE GIVEN IN A FORMER PROCEEDING.

- 28. In general.
- 29. Same parties—Cross-examination.
- 30. Mode of proof.

VIII. MISCELLANEOUS.

IX. BOOKS OF CORPORATIONS AS EVIDENCE.

- 31. In general.
- 32. Records of corporations.
- 33. Against whom competent.
- 34. Minutes proved by parol when.
- 35. Authentication of corporate records.
- 36. Parol evidence to vary corporate minutes.
- 37. Accounts and business entries.

I. OF ANCIENT POSSESSIONS.

§ 1. In general.—Mr. Greenleaf says: "A second exception to the rule rejecting hearsay evidence is allowed in cases of ancient possession, and in favor of the admission of ancient

documents in support of it. Upon the same principle and for the same reasons that hearsay evidence is admitted upon questions of pedigree are ancient documents admitted upon questions of ancient possession and in support of them; and an ancient deed or will, or other instrument of title, may be admitted in evidence without direct proof of execution when shown to have come from proper custody, and appearing to be of the age of at least thirty years, if either a corresponding possession under it for at least thirty years is shown, or if such account of it be given as may reasonably be expected under all the circumstances of the case, and as affords a presumption that it is genuine."¹ "When there is nothing suspicious about them, they are presumed to be genuine without express proof, the witnesses being presumed to be dead."² The admission of ancient documents purporting to constitute part of the transactions themselves, to which, as acts of ownership, or of the exercise of right, the party against whom they are produced is not privy, are hearsay evidence of ancient possession.

§ 2. **Declarations accompanying possession.**—Wood, in his *Practice Evidence*,³ says: "The mere existence of a deed for more than thirty years, without proof of accompanying possession, is not enough in any case to authorize it to be read in evidence as an ancient deed without proof of its execution.⁴ But proof of possession under the deed, even for a short time, will be sufficient. Thus, where possession for five years was proved, it was held that the deed, being more than thirty years old, was admissible in evidence as an ancient deed.⁵ But the fact that there has been no possession under the instrument will not defeat the admissibility of the instrument, if its authenticity is otherwise established, or such facts are shown as raise a fair presumption of its genuineness.⁶ As the

¹ 1 Greenl. Ev., §§ 141, 143, 144; 31 Ga. 593; *Clark v. Wood*, 34 N. H. Enders v. Sternberg, 2 Abb. Ct. App. 447.

Dec. 31; *Crowder v. Hopkins*, 10 ³Sec. 99.

Paige, 183; *Storing v. Bowen*, 6 Barb. ⁴Fairly v. Fairly, 38 Miss. 280; 109; *Jackson v. Luquere*, 5 Cow. 221; *Gainor v. Cotton*, 49 Tex. 161; *Wilson v. Betts*, 4 Denio, 201; *Clark* *Blakeman v. Doughty*, 40 N. J. L. 319. *v. Owen*, 18 N. Y. 434; *Ridgeley v. Johnson*, 11 Barb. 527.

⁵Namlin v. Burwell, 75 Va. 551.

² 1 Greenl. Ev., § 144; *Doe v. Roe*,

⁶*White v. Hutchins*, 40 Ala. 253.

value of these documents depends mainly on their having been contemporaneous, at least with the act of transfer, if not part of it, care is first taken to ascertain their genuineness; and this may be shown *prima facie* by proof that the document comes from the proper custody, or by otherwise accounting for it. Documents found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, or in the possession of persons having an interest in them, are in precisely the custody which gives authenticity to documents found within it.¹ The absence of proof of possession affects merely the weight and not the admissibility of the instrument; and ancient documents purporting to be a part of the transaction to which they relate, and not a mere narrative of them, are receivable as evidence that those transactions actually occurred. Where proof of possession cannot be had, the deed may be read, if its genuineness is satisfactorily established by other circumstances."

§ 3. Private titles — Hearsay not admissible as to. — Hearsay is, in general, inadmissible to prove particular facts, unless such facts have become matters of general reputation; and such evidence is also inadmissible for the purpose of proving private titles, when unsupported by any analogy to matters of public or general interest.²

§ 4. Maps. — Maps and ancient surveys, as well as reputation, are evidence to elucidate and ascertain a boundary. In the trial of actions involving title to lands, plans of the premises may be shown to the jury, and taken by them to the jury-room, if proved to be correct so far as they go.³ An *ex parte* map or diagram or plat made by a witness and shown to be correct may be introduced in evidence, not as independent evidence, but to be considered in connection with other evidence to enable the court or jury to understand and apply it,⁴ and may be used by a surveyor who made it to explain and illustrate his testimony as to measurements made by him.⁵

¹ Winne v. Patterson, 9 Pet. 663;
Law v. Mumma, 43 Pa. St. 267.

² Wood's Prac. Ev., § 100; Dids-
bury v. Thomas, 14 East, 323.

³ Wood v. Williard, 36 Vt. 82.

⁴ State v. Harr (W. Va.), 17 S. E.
Rep. 794.

⁵ Goldsborough v. Paddock (Iowa),
54 N. W. Rep. 431.

So in a suit between the owners of adjoining land to establish the dividing line, both parties deriving their title from the same grantor, a map annexed to the deed of the premises to said grantor and referred to in the deed is evidence.¹

§ 5. **Perambulations.**—Mr. Greenleaf says: “Perambulations consist of the acts of persons making a survey, marking boundaries, setting up monuments, and the like, including their declarations respecting such acts, made during the transaction. Evidence of what these persons were heard to say upon such occasions is evidence, not however as hearsay, but as part of the *res gestæ*, and explanatory of the acts themselves, done in the course of the ambit.”² It is held to be usual to admit what old people, since deceased, who accompanied the perambulation, were heard to say on such occasions respecting the boundaries. Where a surveyor who was present and assisted in making a survey, and who pointed out to several witnesses a corner as made by him or in his presence when the original survey was made, is shown on the trial to be incapable on account of his physical condition to testify, testimony of such witnesses to the declarations of such surveyor is competent.³

§ 6. **Modern exercise of right.**—As a general rule, evidence of reputation is not to be received, unless a foundation be laid, by other evidence, of the right. But the absence of such evidence only affects the value of the evidence.

§ 7. **Private boundaries — Hearsay to establish.**—The declarations of deceased persons who are shown to have been in a position to know the facts are admissible to establish the boundaries of lands owned by private persons.⁴ And in a controversy as to whether certain stones constitute a corner-bound of two lots of land, a former owner of one having long acquaintance with the disputed bound may testify that he “always supposed these two stones were the corner,” and that he “knew no other,” and that no question to the contrary was made during his ownership.⁵ Common reputation

¹ Crawford v. Loeper, 25 Barb. 449. 178; 39 N. Y. State Rep. 706; Enliss

² 1 Greenl. Ev., § 146; Elliot v. Pearl, v. McAdams, 108 N. C. 507; Muller

1 McLean, 211.

³ Griffiths v. Sauls, 77 Tex. 630.

⁵ Leach v. Bancroft, 61 N. H. 411.

⁴ Donohue v. Whitney, 133 N. Y. And see Griffith v. Sauls, 77 Tex. 631.

or hearsay is allowed from necessity. Thus, in *Higley v. Bibwell*,¹ aged men who lived in the vicinity were allowed to testify that when young they heard old men, since dead, say there was a traveled road or highway over the land in dispute. But this evidence is only admissible where the person making the declarations is shown to be dead,² and is shown to have had actual knowledge of the lines or boundaries in question, and stood in such relation to the property as to have no interest to misrepresent the fact.³

§ 8. **Deceased surveyors — Declarations of.**—Declarations of a surveyor employed to run a boundary, if made in connection with his work and in reference to it, are admissible in evidence after his death against the party who employed him.⁴ The same rule prevails where the surveyor is shown to be incapable on account of his physical condition to testify.⁵ The declarations of deceased persons who are shown to have been in a situation to know the facts, although they have no interest whatever in the establishment of the boundaries, are admitted as evidence.⁶ But no oral evidence, much less hearsay, can be received to change the objects mentioned in the deed, entry or survey, or, in other words, to substitute one object for another. When corners in a deed are lost, they may be proved by reputation, but not to contradict the deed; as where the deed sets a sugar and ash tree as the southeast corner, and two beeches for the northeast corner, reputation is not admissible to substitute a hickory, oak and beech tree for the first, nor two hickories for the other.⁷

§ 9. **Owner's declarations.**—Wood, in his *Practice Evidence*, say: "Declarations by the owners of land, made against their pecuniary or proprietary interest, are admissible, provided they do not question a title which the declarant had no right to question."⁸ Under this rule the declarations of

¹ 9 Conn. 447.

² *Wood v. Williard*, 37 Vt. 372.

³ *Mason v. McCormack*, 85 N. C. 226; *Donohue v. Whitney*, 133 N. Y. 178; 39 N. Y. State Rep. 706.

⁴ *Barclay v. Howell's Lessees*, 6 Pet. 498; *McCormick v. Barnum*, 10 Wend. 105.

⁵ *Griffith v. Sauls*, 77 Tex. 630.

⁶ *Blythe v. Sutherland*, 3 McCord (S. C.), 258; *Bonnett v. Devebaugh*, 3 Bin. (Pa.) 175.

⁷ *Wood's Prac. Ev.*, § 111; *McCoy v. Galloway*, 3 Ohio, 282.

⁸ *Everts v. Young*, 52 Vt. 329; *Putman v. Fisher*, id. 191; *Smith v. Martin*, 17 Conn. 399; *White v. Long*, 24 Pick. 319.

one person in possession of land in disparagement of his own title are admissible in evidence against him and those claiming under him, but declarations in favor of his own title are inadmissible.¹ Declarations of persons in possession of property can only be given in evidence as part of the *res gestæ*, or in respect to their interest in the subject-matter; and a party must be shown to have been in possession before his declarations made at the time are admissible as part of the *res gestæ*, and as explanatory of the possession.² Declarations made by an owner in his own favor are not admissible to show the location of a boundary, but are admissible for the purpose of showing non-acquiescence in a different line or boundary. The rule as to the *lis mota* prevails in reference to declarations relating to matters of general or public interest."³

II. DYING DECLARATIONS.

§ 10. *In general.*—In cases of homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations, dying declarations are allowed, if made *in extremis*, as to the cause of the declarant's death and as to the person who inflicted the fatal wound. In other words, a declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is competent only in trials for murder or manslaughter of declarant.⁴ Such declarations are admissible in favor of the defendant as well as against him.⁵ It is essential to the admissibility of such declarations that at the time they were made the declarant was in actual danger of death, that he had full apprehension of his danger, and that death ensued.⁶ Whether a statement by deceased was made when he was *in extremis* and had given up all hope of life, so as to render it

¹ Gibney v. Morchay, 34 N. Y. 301; Allen v. Grove, 18 Pa. St. 277; Dow v. Jewell, 18 N. H. 340; Peabody v. Hewett, 52 Me. 33.

² Ellis v. Janes, 10 Cal. 456.

³ Wood, Prac. Ev., § 114.

⁴ People v. Green, 1 Park. Crim. Rep. 11; Com. v. Casey, 11 Cush. 417; Kilpatrick v. Com., 31 Pa. St. 198.

⁵ Mattox v. United States, 146 U. S. 140; United States v. Schneider, 21 Wash. L. Rep. (D. C.) 45.

⁶ Pulliam v. State, 88 Ala. 1; Hussey v. State, 87 id. 121; People v. Lanogan, 81 Cal. 142; State v. Johnson, 26 S. C. 152.

admissible as a dying declaration, is to be determined, not only by what he said, but also by his evident danger and all the surrounding circumstances.¹ It is not essential that the declarant expressly stated that he had no hope of recovery, or was going to die. It is sufficient if it satisfactorily appears in any mode that the declarations were made under a sense of impending death;² and the expression by deceased of a belief that he was going to recover, made several hours after his dying declaration, is not admissible to show that such declaration was made while he had a hope of recovery.³ It is the impression of impending death and not the rapid succession of it, which renders dying declarations admissible.⁴ Thus, sufficient ground is laid for the admission of declarations, where they were made less than two days after the wounding and six hours before death ensued, after deceased had been told by his physician that he must die, whereupon he said he had no hope of recovery;⁵ or that he has to die, and that a person named "has killed him."⁶ The fact that the written statement is sworn to does not render it inadmissible.⁷ Statements made by an injured party at different times are all admissible as dying declarations, if they were made under a sense of impending death.⁸ Declarations of one who had been shot, made a few days after the shooting, at a time when he felt conscious of approaching death and believed there was no hope of recovery, are admissible, although he lived a month after they were made.⁹ They are competent if made after the attending physician has told the person that the chances are all against him, or where the deceased stated that he was dying.¹⁰

§ 11. To material matters only.—To be competent as dying declarations the statements of the deceased must not only relate to the immediate circumstances of the transaction result-

¹ *Com. v. Matthews* (Ky.), 12 S. W. Rep. 333; *Hussey v. State*, 87 Ala. 121.

² *State v. Russell* (Mont.), 32 Pac. Rep. 854.

³ *State v. Shaffer* (Oreg.), 32 Pac. Rep. 545.

⁴ *Pulliam v. State*, 88 Ala. 1; *Archibald v. State*, 122 Ind. 122.

⁵ *State v. Nelson*, 101 Mo. 464.

⁶ *State v. Bradley*, 34 S. C. 136; *White v. State*, 30 Tex. App. 652.

⁷ *Turner v. State*, 89 Tenn. 547; *People v. Bemmerly*, 87 Cal. 117.

⁸ *Hines v. Com.*, 11 Ky. L. Rep. 815.

⁹ *Fulcher v. State*, 28 Tex. App. 465.

¹⁰ *State v. Welsor* (Mo.), 21 S. W. Rep. 443; *State v. Umble*, 22 S. W. Rep. 378; *Evans v. State* (Ark.), 22 S. W. Rep. 1026.

ing in the injury, but must detail facts, and not the mere opinion of the one making them.¹ Such declarations are only admissible as to matters about which the deceased would have been competent to testify if sworn in the cause.²

§ 12. **Declarations must be complete.**—In order to make dying declarations admissible, the declaration or statement must be complete in itself; for if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented by any cause from making, they will not be received.³ By “complete in itself” is meant that the declarant’s statement of any given fact shall be all he intended to say as to that fact.⁴ When the declaration has been committed to writing at the time it was made, it must be produced or accounted for. If the deposition of the deceased has been taken under the statute, but for any cause is inadmissible as such, it is still, if made *in extremis*, admissible as a dying declaration.⁵ The substance of the declaration may be given in evidence if the witness is not able to state the precise language used.⁶ The declarations may be elicited by questions and may be given by signs.

§ 13. **Weight to be given dying declarations.**—Dying declarations are to be received with great caution, and, except where the circumstances were such as to render it next to impossible that the deceased could be mistaken as to the criminal facts stated, juries should scan the statement with great care.⁷

III. DECLARATIONS AGAINST INTEREST.

§ 14. **In general.**—Sir J. Stephen, in his Digest of the Law of Evidence,⁸ states the rule to be that “a declaration is deemed to be relevant if the declarant had peculiar means of

¹ Com. v. Mathews (Ky.), 12 S. W. 517; State v. Patterson, 45 Vt. 308; Rep. 333; State v. Elkins (Mo.), 14 S. McLean v. State, 16 Ala. 672.
W. Rep. 116.

² Jones v. State, 71 Ind. 66; Brother- Rex v. Woodcock, 1 Leach, C. C. 502.
ton v. People, 75 N. Y. 159; United ⁶ Starkey v. People, 17 Ill. 17;
States v. Heath, 19 Wash. L. Rep. Montgomery v. State, 11 Ohio, 424.
(D. C.) 818. ⁷ Jackson v. Kniffen, 2 Johns. 35;

³ Com. v. Vass, 3 Leigh (Va.), 786; Young v. State (Ala.), 10 S. Rep. 913;
State v. Crabtree, 111 Mo. 136. Bates v. Com., 14 Ky. L. Rep. 177;

⁴ Hall v. Com. (Va.), 15 S. E. Rep. State v. Banister, 35 S. C. 290.

⁸ Art. 28.

knowing the matter stated, if he had no interest to misrepresent it, and if it was opposed to his pecuniary or proprietary interest.¹ The whole of any such declaration, and of any other statement referred to in it, is deemed relevant, although matters may be stated which were not against the pecuniary or proprietary interest of the declarant; but statements not referred to in or necessary to explain such declarations are not deemed to be relevant merely because they were made at the same time or recorded in the same place.”²

§ 15. **Conditions precedent to admissions.**—Mr. Greenleaf says: “To render declarations against interest admissible except in suits to which the declarant is a party, it must first be shown that he is dead and that the statement or entry should be against the interest of the declarant. The amount of pecuniary interest is not important; it is sufficient if, at the time the declaration or entry was made, it charged the person making it to any extent.”³ To render the declaration of a deceased person admissible as evidence it must appear that the declarant is deceased; that he possessed competent knowledge of the facts or that it was his duty to know them; and that the declarations were at variance with his interest.”⁴ This class embraces not only entries in books, but all other declarations or statements of facts, whether verbal or in writing, and whether made at the time of the fact declared or at a subsequent day.⁵ Thus, where entries have been made by a deceased person in the due course of business in his books, such entries are admissible to prove the facts. But a written statement of the facts in a disputed cause is not admissible after the death of the writer simply because entered in a book.⁶ An entry in the shop-books of one who repaired a wagon, but who has since died, showing a charge against the owner of the wagon for a number of spokes, is admissible in favor of such owner against a railroad company, where the

¹ *Gleador v. Atkins*, 1 C. & M. 423. *Maine*, 25 id. 33; *Harris v. Clark*, 3

² *Doe v. Bevis*, 7 C. B. 456; *Higham* N. Y. 93; *Pike v. Hays*, 14 N. H. 19.
³ *Ridgeway*, 2 Smith's L. C. 318; *Pearce v. Jackson*, 10 Ired. (N. C.)
Staed v. Heaton, 4 T. R. 669. 355.

⁴ *Rex v. Worth*, 4 Q. B. 132.

⁵ *Horton v. Wood*, 66 Hun, 632; 50

⁶ *Greenl. Ev.*, § 147; *White v. N. Y. State Rep.* 679.
Chouteau, 10 Barb. 202; *Smith v.*

character or extent of an injury to the wheel by collision with a locomotive is in dispute.¹

§ 16. Declarations of deceased grantor.—Declarations of a deceased grantor made when in possession of real estate, in reference to his title thereto and against his interest, may be given in evidence even in actions between third parties.² A distinction is made between declarations against interest and those made by one in privity of estate. In the first case the evidence is admissible without privity of estate, and hence the declarations must be not only against interest, but the declarant must be dead; while in the case of declarations by one in privity of estate, the declarations are admissible whether the declarant be alive or dead. In *Pependick v. Bridgewater*³ it was held that the declarations of a deceased tenant as to the non-existence of a right of common on the part of the owner of the land occupied by such tenant were not admissible, for the reason that the tenant could not derogate from the right of the landlord or owner of the fee by any declaration he might make. The case was stated to be in effect an exception to an exception. Lord Campbell, C. J., in stating the rule, said, generally, any declaration of a deceased person on a matter with which he is acquainted, made against his interest, is admissible in evidence. But the learned chief justice continued by saying that an exception to this rule was that you cannot admit in evidence the declaration of a tenant which derogates from the title of a reversioner. The distinction is taken between declarations against interest and those made by one in privity of estate. The court receives declarations of a deceased person against his interest because of the likelihood of their being true, of their general freedom from any reasonable probability of fraud, and because they cannot be set up or proven until the death of the party making them.

§ 17. Declarations of decedent against his representatives.—The declaration of a deceased party to a written instrument, made to a third person prior to the execution of the instrument, and offered to be proved at the trial for the

¹ *Lassone v. Boston & L. R. Co.* (N. H.), 46 Alb. L. J. 273.

² *Lyon v. Rickon*, 56 N. Y. State Rep. 804.

³ 5 El. & Bl. 166.

purpose of impeaching and annulling that instrument for the fraud of the deceased, but which was not communicated by the witness to the other parties, is but hearsay evidence, and that too of an extremely dangerous character; and when standing alone, and not merely in aid of direct evidence, is incompetent to destroy the validity of the writing.¹

§ 18. Declarations of testator as to contents of lost will. When there is a question as to the contents of a lost will, the declarations of the deceased testator as to its contents are deemed to be relevant, whether they were made before or after the loss of the will.² Declarations of a testator, both before and after making his will, are admissible to show the existence of a delusion, or his mental condition, or that the will was induced by fraud and undue influence.³ Declarations of a deceased person as to his intent in making a deposit in the name of another with himself as trustee, and his reasons therefor, are admissible in favor of the beneficiary against the administrator of such person.⁴

§ 19. Donor.—Declarations of a voluntary trustee under a trust created by himself, made after its creation, are inadmissible to affect it, when no power of revocation was reserved.⁵

IV. MEMORANDA.

§ 20. Entries by a public officer from reports by other officers.—A declaration is deemed to be competent when it was made by the defendant in the ordinary course of business, or in the discharge of professional duty, at or near the time when the matter stated occurred, and of his own knowledge.⁶ A material ultimate fact may be proved by the evidence of a witness who, having no personal recollection of the fact at the time of his examination as a witness, testifies that he made, or saw made, an entry of the fact at the time or re-

¹ *Hard v. Ashley*, 63 Hun, 634; 44 N. Y. State Rep. 795.

² 3 Redf. Wills, 15; 1 Whart. Ev., § 139.

³ *Haines v. Hayden*, 95 Mich. 332; *Hindman v. Van Dyke*, 153 Pa. St. 243.

⁴ *Ducker v. Whitson*, 112 N. C. 444;

Re Brown's Estate (Vt.), 26 Atl. Rep. 638; *Perkins v. Hasbrouck*, 155 Pa. St. 494; *Reggs v. Powell*, 142 Ill. 453; *Re Robb's Estate*, 37 S. C. 19.

⁵ *Connecticut River Sav. Bank v. Albee*, 64 Vt. 571.

⁶ *Doe v. Turfford*, 3 B. & Ad. 898.

cently thereafter, which, on being produced, he can verify as the entry he made or saw, and that he knew the entry to be true when made; and such ultimate fact may be proved by showing by a witness that he knew the facts in relation to the matter which is the subject of investigation, and communicated them to another at the time but had forgotten them, and supplementing this testimony by that of the person receiving the communication, to the effect that he entered at the time the facts communicated, and by the production of the book or memorandum in which the entries were made. The admissibility of memoranda of the first class is well settled. They are admitted in connection with and as auxiliary to the oral evidence of the witness, and this whether the witness, on seeing the entries, recalls the facts, or can only verify the entries as a true record made or seen made by him at or soon after the transaction to which it relates.¹ The other branch of the proposition has not been very generally adjudicated in the several states, although the admissibility of entries made under such circumstances was apparently approved in *Payne v. Hodge*² and *Mayor, etc. of N. Y. v. Second Ave. R. Co.*³ Thus, an account kept in the ordinary course of business of laborers employed in the prosecution of a work, based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master, but of a higher grade, who in time also, in accordance with his duty, entered the time as reported, is admissible if verified by the evidence of the foremen that they made true reports, and of the person who made the entries that he correctly entered them. It seems, however, that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation.⁴

¹ *Halsey v. Sinsebaugh*, 15 N. Y.

³ 103 N. Y. 572.

485; *Guy v. Mead*, 22 id. 462.

⁴ *Peck v. Valentine*, 94 N. Y. 569.

² 71 N. Y. 598.

V. SHOP-BOOKS, ACCOUNT-BOOKS, ETC.

§ 21. **In general.**—A general rule prevails in this country — adopted, it is said, from the law of Holland — that the books of a tradesman or other person engaged in business, containing items of account, kept in the ordinary course of book accounts, are admissible in favor of the person keeping them, against the party against whom the charges were made, after the following preliminary facts have been shown, viz.: 1. That the books offered are his books of account kept in the regular course of business. 2. That there was a course of dealing between the parties. 3. That some articles or service charged was actually furnished. 4. That the party had no clerk or book-keeper. 5. That he kept fair and honest accounts. The rule admitting account-books of a party in his own favor in any case was a departure from the ordinary rules of evidence. It was founded upon a supposed necessity, and was intended for cases of small dealers who kept no clerks, and was confined to transactions in the ordinary course of buying and selling or the rendition of services. In these cases some protection against fraudulent entries is afforded in the publicity which to a greater or less extent attends the manual transfer of tangible articles of property, or the rendition of services, and the knowledge which third persons may have of the transactions to which the entries relate. It would be unwise to extend the operation of the rule admitting a party's books in evidence beyond its present limits.¹ The above rule has no application to the case of books or entries relating to cash items or dealings between the parties, and the same necessity does not exist in respect to cash transactions; moreover, entries of cash transactions could be fabricated with much greater safety and with less chance of the fraud being discovered than entries of goods sold and delivered, or of services rendered.² Account-books are always evidence against the party keeping them, without any preliminary proof.³ But under the above rule a bank's ledgers are not admissible in

¹Smith v. Bentz, 131 N. Y. 169; 42 N. Y. State Rep. 336; McCain v. N. Y. State Rep. 879. Peart, 145 Pa. St. 516; Powers v.

²Vosburgh v. Thayer, 12 Johns. Savin, 46 N. Y. State Rep. 709; Taylor v. Davis, 82 Wis. 455; Smith v. 461.

³Adams v. Olen, 64 Hun, 268; 46 Collins, 94 Ala. 394.

evidence in its own behalf in an action for an alleged deposit.¹ But where books of original entry have been destroyed by fire, the items therein may be proved from the ledger.² Whether the books of a party are admissible or not, he may use them as a memoranda to refresh his memory, and any tribunal is quite apt to give additional weight to the evidence of the party which is sustained by the entries of the event, recorded at the time of the occurrence.³ In New York it is not essential to produce the party himself as a witness;⁴ but it is necessary to show: 1. That the books offered are his books of account, kept in the regular course of business. 2. That there was a course of dealing between the parties. 3. That some articles or services charged were actually furnished. 4. That the party had no clerk or book-keeper. 5. That he kept fair and honest accounts.⁵ If the books are kept according to the usage and degree of intelligence of the party it is sufficient. Thus, a notched stick kept for this purpose was held to be a good book of original entries where it was the only method by which a party kept his accounts;⁶ and so pieces of board sawed out of the party's corn-crib; so are scraps of paper; so are boards upon which the measurements of lumber are marked by the one who cut and delivered the lumber.⁷

In an action for services rendered, where there is evidence tending to show that an account-book was made up from tallies by employees in a mill, kept upon a planed shingle and delivered to the persons keeping the book, who made entries from them, the book is admissible.⁸ The account is not excluded because kept in ledger form, so that the charges against defendant are on a separate page from those against others.⁹ But if shown not to be the book of original entries, it is not

¹ Porter v. County F. Nat. Bank of Williams, 4 Ind. App. 501.

² McCrady v. Jones, 36 S. C. 136; Stillwater v. Fairwell, 64 Vt. 286; Chatauga Ore & I. Co. v. Blake, 144 U. S. 476.

³ Strand v. Tilton, 4 Abb. Ct. App. Dec. 324; Robinson v. Smith, 111 Mo. 205; Muckle v. Rennie, 41 N. Y. State Rep. 97.

⁴ Tomlinson v. Borst, 30 N. Y. 42.

⁵ Smith v. Bentz, 131 N. Y. 169; 45 Alb. L. J. 213; 42 N. Y. State Rep. 879; Knight v. Cummington, 6 Hun, 100.

⁶ Rowland v. Barton, 2 Harr. (Del.) 288.

⁷ Pallman v. Smith, 135 Pa. St. 188.

⁸ West v. Van Tuyl, 119 N. Y. 623; 28 N. Y. State Rep. 549.

⁹ Faxon v. Hollis, 13 Mass. 428.

competent without producing or accounting for those entries.¹ And if it appear that the books offered are a part of a system of books involving others, which may be necessary to a complete view of the state of accounts, the others must be produced or accounted for.² Thus, where the ledger is offered, a day-book shown to have been kept must be produced. There must have been some course of dealing between the parties: a single sale is not sufficient.³ Independent evidence that some article or service charged was furnished is indispensable.⁴ One article delivered and one item of work done, as charged, satisfy this requirement.⁵ A party cannot testify from books of account kept partly by himself and partly by others.⁶ And unsworn accounts, purporting to be those of sales made by an auctioneer at the request of the sheriff, which were not made by the witness producing them, and are proven only to have been rendered by the auctioneer to the sheriff, are not admissible in evidence.⁷ The above rule does not apply to admit the books of a party to the suit, if they were kept by a regular clerk or book-keeper, whose business it was to notice sales and enter them in the books.⁸ But the books of daily entries made by the party himself are not rendered incompetent by the fact that his servant, porter or messenger noted in temporary form the deliveries made by him, and reported them to the party, who upon such information made the entries in question.⁹ The books of a partnership may be proved by the partner who kept the books, or in case of his death by proof of his handwriting.¹⁰ To show that the party kept fair and honest books, the testimony of one witness is enough, who had dealt with the party, and settled with him by his account;¹¹ but he must be a customer. The rules relating to the admission of books of account in the different states are not uni-

¹ *Vilmar v. Schall*, 35 N. Y. Supr. Ct. 67.

² *Pendleton v. Meed*, 17 N. Y. 72; *Larue v. Rowland*, 7 Barb. 107.

³ *Corning v. Ashley*, 4 Denio, 354.

⁴ *Morrill v. Whitehead*, 4 E. D. Smith, 239.

⁵ *Linnell v. Southerland*, 11 Wend. 563.

⁶ *Hancock v. Flynn*, 54 Hun, 638; 28 N. Y. State Rep. 354.

⁷ *McIlhargy v. Chambers*, 27 N. Y. State Rep. 921; 117 N. Y. 532; *Kohler v. Lindenmeyer*, 129 N. Y. 498; 35 N. Y. State Rep. 633; *Dooley v. Moan*, 57 Hun, 535; 33 N. Y. State Rep. 118.

⁸ *Sickles v. Mather*, 20 Wend. 72.

⁹ *Hauptman v. Catlin*, 1 E. D. Smith, 729.

¹⁰ *Kron v. Levy*, 1 Hun, 172.

¹¹ *Beattie v. Qua*, 15 Barb. 137.

form. In most of the states, if it appears that there is, in fact, living attainable proof of the item, independent of the entries, the latter are then inadmissible. The rule excludes the books when better evidence of the facts is attainable, and the books are admissible when from necessity they afford the best evidence of the facts contained therein.¹ The rule of admission of shop-books has no application to the case of books of entries relating to cash items or dealings between the parties.² The same necessity does not exist in respect to cash transactions as to cases of transactions in the ordinary course of buying and selling or the rendition of services.³

§ 22. **Time of entry material when.**—To be admissible at all, entries should be made at or near the time of the transaction. The law fixes no precise instant. They are not to be registers of past transactions, but memoranda of transactions as they occur.⁴ A party to a contract the terms of which are in dispute cannot give in evidence his own statements, either oral or written, made subsequent to the contract, in corroboration of his version of the contract.⁵ It is no objection to a book that the entries were made by the party from data furnished him by his workmen, if he knows the facts therein stated. It is no objection to the book, though the entries be first made on a slate and then transcribed by the party, if done in the ordinary course of his making such entries.⁶ The entry must be in the book of the party, kept by him for the purpose of his daily accounts, generally, with all those persons who may have dealings with him, and must be made in conformity to the prevalent manner of his keeping the book, and in a regular course with the other charges. If they stand isolated on the front leaf of the book, and not falling into a regular order with the other charges, they will be rejected. An account properly in evidence is competent evidence of the facts of sale, of the dates, of the price or value, and of the delivery.⁷

¹ *Wheeler v. Smith*, 18 Wis. 651; *Ward v. Wheeler*, 18 Tex. 249.

² *Vosburg v. Thayer*, 12 Johns. 461.

³ *Smith v. Bentz*, 131 N. Y. 169; 42 N. Y. State Rep. 879.

⁴ *Ewing v. Sparks*, 7 N. J. L. 59; *Bentley v. Ward*, 116 Mass. 333.

⁵ *Griesheimer v. Tanenbaum*, 124 N. Y. 650; 36 N. Y. State Rep. 329.

⁶ *Faxon v. Hollis*, 13 Mass. 427.

⁷ *Batchelder v. Sanborn*, 22 N. H. 325.

VI. MEMORANDA AS EVIDENCE.

§ 23. **In general.**—Memoranda of facts, made by an eye-witness at the time of the occurrence, and which he swears to be correct, are not generally evidence,¹ except where they were made in the due course of business and the person making them is dead or has absconded, or for any cause his testimony cannot be obtained, and then only of such facts as to which he would be competent to testify if living.² Thus, a memorandum is admissible in evidence without testimony of the person who made it, where he is without the jurisdiction of the court and his handwriting is proved.³ A written memorandum made by an officer in the course of his official duty, which is against his interest, is admissible after his death, as well of facts against his interest as of other collateral and incidental facts and circumstances contained in it.⁴

§ 24. **Refreshing memory by.**—A witness who has drawn up a written narrative of a matter or transaction may in many cases use it while under examination as a script to refresh his memory.⁵ In cases requiring many details of duty, quantity, etc., it is proper to allow a witness to consult, but not to read from, memoranda made by him of facts within his own knowledge, to which he cannot speak in sufficient detail without such aid, although the memoranda were made in preparation for trial; that is to say, a witness may use a memoranda, or any book or paper, to refresh his memory, if he can afterwards swear to the fact from recollection; but if he cannot so swear, otherwise than as finding it in the book, then it must be produced;⁶ while the general rule is that memoranda of dates, names, figures and values made by a witness at the time of the transaction to which they relate, and sworn to by him to have been true statements when made, are admissible in evidence

¹ *Gilmore v. Wilson*, 53 Pa. St. 194; 150; *Thomas v. Beal*, 48 Fed. Rep. 618. But see *Granning v. Swenson*, *People v. Elyea*, 14 Cal. 144; *Golding v. Orcutt*, 44 Vt. 541; *Downs v. New York Cent. R. Co.*, 47 N. Y. 82. 49 Minn. 381.

² *Avery v. Avery*, 48 Cal. 193; 507. ⁴ *Livingston v. Arnoux*, 56 N. Y. 507. ⁵ *Howland v. Union Theological Sem.*, 5 N. Y. 219; *Marcay v. Shults*, 29 id. 351.

³ *Laboree v. Klosterman*, 33 Neb. 56. ⁶ *Wood v. Ambler*, 8 N. Y. 170.

in connection with his testimony, without regard to whether or not they corroborate it;¹ and that all memoranda made at the time of the transaction are admissible to refresh the recollection of a witness, although not as independent evidence;² and that a witness may use a memorandum made by any person, if, after inspecting it, he can testify to the facts from his own recollection;³ a paper referred to by a witness for the purpose of refreshing his memory is inadmissible in the absence of evidence that after reference he is unable to recollect the facts.⁴ Thus, a witness may refer to his account books or his cash book, or to letters written by himself relating to the transaction, or even to a bill of particulars, or memorandum not made by himself, if upon reading it he is then able to recollect and testify to the facts contained therein.⁵ But such memoranda are not admissible in evidence unless they are of a character such as maps, diagrams or tabular statements, reasonably necessary to render the testimony intelligible, and are proven to be correct. In *Howard v. McDonough*⁶ the court say: "The law as to the use of memoranda by witnesses while testifying is: (1) A witness may, for the purpose of refreshing his memory, use any memoranda, whether made by himself or another, written or printed; and when his memory has thus been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence. (2) When a witness has so far forgotten the facts that he cannot recall them, even after looking at a memorandum of them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, and which he believes to be correct, such memorandum in his own handwriting may be received as evidence of the facts therein contained, although the witness has no present recollection of them. (3) Memoranda may be used in other cases which do not precisely come under either of the foregoing heads. A store of goods is

¹ *Continental Ins. Co. v. Insurance Co. of Pa.*, 51 Fed. Rep. 884; *Glaspie v. Krator*, 56 id. 203.

² *Williams v. Wager*, 64 Vt. 326.

³ *Culver v. Scott & W. Lumber Co.* (Minn.), 55 N. W. Rep. 552.

⁴ *Voisin v. Commercial Mut. Ins. Co.*, 51 N. Y. State Rep. 635; 67 Hun, 365.

⁵ *Meacham v. Pell*, 51 Barb. 65; *Stuart v. Binnse*, 7 Bosw. 195.

⁶ 77 N. Y. 592.

wrongfully seized, and an action is brought to recover for the conversion. There are thousands of items. No witness could carry in his mind all the items and the values to be attached to them. In such a case a witness may make a list of all the items and their values, and he may aid his memory, while testifying, by such list. He must be able to state that all the articles named in the list were seized, and that they were of the values therein stated; and he may use the list to enable him to state the items. After the witness has testified, the memorandum which he has used may be put in evidence, not as proving anything of itself, but as a detailed statement of the items testified to by the witness. The manner in which the memorandum, in such a case, may be used is very much in the discretion of the trial judge. He may require the witness to testify to each item separately, and have his evidence recorded in the minutes of the trial, and then the introduction of the memorandum will not be important; or he may allow the witness to testify quite generally to the items and their values, and receive the memorandum as the detailed result of his examination, leaving to the adverse party a more minute cross-examination.¹ In order to refresh the recollection of a witness, it is not important that the paper, book or memorandum should have been written or printed by the witness himself, or that it should have been an original writing. It is sufficient if he saw it while the facts stated therein were fresh in his memory, and knows that they are correctly transcribed.”²

§ 25. When memoranda must be made by a witness.—A memoranda used by a witness to refresh his memory and to be allowed as evidence in the case must, as a general rule, have been made by the witness himself — or by another person at his dictation — at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at the time fresh in his memory; or if made by any other person, and read by the witness, within the same limits as to time, it must further appear that

¹ McCormick v. Pennsylvania C. R. Co., 49 N. Y. 303; Acklia v. Hickman, 63 Ala. 594; 35 Am. Rep. 54.

² Chapin v. Lapham, 20 Pick. 467; Huff v. Bennett, 6 N. Y. 337; George v. Jay, 19 N. H. 544.

when he read it he knew it to be correct.¹ A memorandum which is proper under this rule, and is used accordingly, becomes competent, and may be read as evidence of the facts testified to from it, if it be the original entry, not a copy, and if the witness' memory, after being refreshed, does not enable him to testify to the facts without the memorandum.² A copy should not be used so long as the original is in existence and its absence unexplained; for the same rule requiring the production of the best evidence is equally applicable whether a paper is produced as evidence in itself, or is merely used to refresh the memory. But after proof of the loss of the original, a copy may be read to the jury, not as evidence of the facts contained in it, as in case of an original entry, but as a statement in detail of what the witness has testified directly.³

§ 26. When witness need not have recollection independent of memorandum.—In order that a document may be used to refresh one's memory, it is by no means necessary that the witness, after having seen it, should have any independent recollection of the facts mentioned therein or connected therewith; it is sufficient if he remembers that he has seen the paper before, and that when he saw it he knew its contents to be correct; or even if, entirely forgetting the circumstances themselves, and the fact of his having seen the paper, he can still, in consequence of recognizing his signature or writing upon it, vouch for the accuracy of the memorandum, or swear to the particular fact in question.⁴

§ 27. Memoranda primary evidence when.—Original entries made by a witness are admissible as auxiliary to his evidence only when he is unable to distinctly recollect the fact without their aid. The rule which renders such entries admissible rests upon the principle of necessity for the reception of secondary evidence, and is not applicable when the witness has a distinct recollection of the essential facts to which they relate. The primary common-law proof is then furnished, and the necessity for evidence of the lesser degree

¹ *Filkins v. Baker*, 6 *Lans.* 518;
Krom v. Levy, 1 *Hun*, 173.

² *Halsey v. Sinsebaugh*, 15 *N. Y.*
485; *Marclay v. Shults*, 29 *id.* 348.

³ *McCormick v. Pennsylvania C. R.*
Co., 49 *N. Y.* 316.

⁴ *Guy v. Mead*, 22 *N. Y.* 462;
Meacham v. Pell, 51 *id.* 65; *Marclay*
v. Shults, 29 *id.* 346; *Anderson v.*
Edwards, 123 *Mass.* 273.

does not arise. And this right, as qualified, to introduce such secondary evidence, is the better rule in view of the opportunity, which otherwise might exist, to superadd a written memorandum to the evidence of a witness, which it cannot be said might not sometimes be improperly made available to strengthen his testimony with a court or jury; and such may be within reasonable apprehension until the moral infirmity of human nature becomes exceptionally less than it yet has. The only exception to this rule is where the memorandum is part of the *res gestæ*.¹ Thus, the rule is that a memorandum itself only becomes evidence when the witness, after examining it, although able to swear that he knew it to be correct when he made it, is unable to state the particulars from recollection.² Hence, in an action for goods sold, a witness who testifies that he made correct original entries of the transaction but has forgotten the transaction may be shown his original entries and read them in evidence.³ The correctness of the entries may be shown either by his testimony of his own knowledge or his testimony that he entered correctly what others told him, if such others are produced and testify that they gave him correctly facts within their own knowledge.⁴ Thus, in *Shear v. Van Dyke*,⁵ a witness having testified that a quantity which he had now forgotten, he had, at the time of the delivery, reported correctly to another, the other was allowed to be called and testify what the quantity was thus reported. So where a temporary memorandum, made by a witness who had since forgotten what was written, had been destroyed by another witness, who in the course of his duty transcribed it in more permanent form, the latter was allowed to produce his copy and testify to what he had transcribed.⁶

VII. EVIDENCE GIVEN IN A FORMER PROCEEDING.

§ 28. **In general.**—Sir J. Stephen, in his Digest of the Law of Evidence,⁷ states the common-law rule to be, that “evidence given by a witness in a previous action is relevant for the pur-

¹ *Nat. Ulster County Bank v. Madden*, 114 N. Y. 280; 23 N. Y. State Rep. 220.

² *Kelsea v. Fletcher*, 48 N. H. 282.

³ *Philbin v. Patrick*, 3 Abb. Ct. App. Dec. 605; 9 Hun, 347.

⁴ *Payne v. Hodge*, 7 Hun, 612.

⁵ 10 Hun, 528.

⁶ *Adams v. People*, 3 Hun, 654.

⁷ Art. 32.

pose of proving the matters in a subsequent proceeding or in a later stage of the same proceeding when the witness is dead, or insane, or so ill that he will probably never be able to travel, or is kept out of the way by the adverse party; or in civil, but not, it seems, in criminal cases, is out of the jurisdiction of the court, or perhaps in civil, but not in criminal cases, when he cannot be found, provided in all cases: (1) That the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness. (2) That the questions in issue were substantially the same in the first as in the second proceeding. (3) That the proceedings, if civil, were between the same parties or their representatives in interest. (4) That in criminal cases the same person is accused upon the same facts."

The rule in this country seems to be that the testimony of deceased witnesses given in a former action between the same parties is allowed as evidence in any subsequent suit between the same parties;¹ and if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane or sick, or unable to testify, or kept away by the adverse party,² the testimony of such witnesses is allowed in evidence in any subsequent proceeding. Testimony thus offered is open to all the objections which might be taken if the witness were personally present.³ This rule is limited in New York, where it is held that where the witness is absent from the state and not dead, his testimony taken on a former trial cannot be read.⁴ And it is provided by section 830 of the New York Code of Civil Procedure, that when a party has died since the trial of an action, or the hearing upon the merits of a special proceeding, the testimony of the decedent, or of any person who is rendered incompetent by section 829 of the same code, taken or read in evidence at the former trial or

¹ *Glass v. Beach*, 5 Vt. 72; *Allen v. 445*; *Caldwell v. State*, 28 Tex. App. Chouteau, 102 Mo. 309; *Rico R. & M. 516*; *Woolenslagle v. Runeto*, 76 Co. v. Musgrave (Colo.), 23 Pac. Rep. Mich. 545; *Long v. Davis*, 18 Ala. 458; *Cox v. State*, 28 Tex. App. 92. 801; *Wilber v. Selden*, 6 Cow. 162;

² *Re Budlong's Will*, 126 N. Y. 423; *Baron v. Crombie*, 14 Mass. 234. 26 N. Y. State Rep. 863; *Whitaker v.*

Marsh, 62 N. H. 477; *Augusta & S. 3* *Crary v. Sprague*, 12 Wend. 41. *Mut. Life Ins. Co. v. National R. Co. v. Randall* (Ga.), 11 S. E. Rep. Bank. & L. Co., 50 Hun, 101; 19 N. 716; *Leeser v. Borkhoff*, 38 Mo. App. Y. State Rep. 38.

hearing, may be given or read in evidence at a new trial or hearing by either party, subject to any legal objection to the competency of the witness, or to any legal objection to his testimony or any question put to him. The testimony of any witness who has died or become insane after a former trial or hearing of a contested proceeding, a special proceeding or an action may be read upon the subsequent trial or hearing by any party to such action or proceeding.

§ 29. **Same parties — Cross-examination.**— The admissibility of this evidence turns rather on the right to cross-examination than upon the precise identity of all the parties. Such testimony is admissible though the two trials are not between the parties, if the second trial is between those who represent the parties to the first by privity in blood, in law or in estate.¹ The rule at common law is, in substance, that if a witness has been examined in a legal proceeding between the same parties, involving the same questions, although judgment in the former action was taken by default in the absence of the adverse party, in such a case that the counsel for either party could have the right to cross-examine, then the evidence of such deceased witnesses may be used.²

§ 30. **Mode of proof.**— It is sufficient if the witness is able to state the substance of what was sworn to on the former trial.³ But he must state in substance the whole of what was said on the particular subject which he is called to prove. If he can state only what was said on that subject by the deceased on his examination in chief, without also giving the substance of what he said upon it in his cross-examination, it is inadmissible.⁴ What the deceased witness testified may be proved by any person who will swear from his own memory, or by notes taken by any person who will swear to their accuracy.⁵ Such evidence may be given on any subsequent trial.⁶ The fact that the witness is absent from the state is

¹ Jackson v. Lawson, 15 Johns. 544; Gildersleeve v. Caraway, 10 Ala. Cleveland v. Haey, 18 Ala. 343; Hunter v. Harris, 131 Ill. 482; La Fayette Mut. Bldg. Ass'n v. Kleimhoffer, 40 Mo. App. 388.

260; Jackson v. Powers, 40 Vt. 611; Brown v. Com., 73 Pa. St. 321.

⁴ Black v. Woodron, 39 Md. 194.

⁵ Clark v. Vorce, 15 Wend. 193.

² Bradley v. Mirick, 91 N. Y. 295.

⁶ Koehler v. Scheider, 31 N. Y.

³ Jackson v. Bailey, 2 Johns. 17; State Rep. 549.

not sufficient in New York.¹ What an interpreter on a former trial says a witness, since deceased, said is competent on a subsequent trial.² The report of evidence on a former trial is inadmissible against a defendant in that trial, where judgment thereon was rendered by default.³ But in *Hussey v. State*⁴ affidavits were allowed to be used, and the objection that the affiants were not subject to cross-examination was held to go to their sufficiency, and not to their competency.⁵ A transcript made by an official stenographer, duly certified by him to be a *verbatim* transcript of his notes of the evidence given upon a former trial, is admissible.⁶

VIII. MISCELLANEOUS.

Stubs of a check-book from which the checks are taken are, like other parol evidence, competent as tending to show payment of a debt.⁷ On the issue as to the value of a stallion, evidence as to its pedigree as registered in a standard register of trotting horses is admissible.⁸ Mortuary tables are admissible to show the expectancy of life.⁹ On a contest over an election the ballots are not only competent, but are a very high order of evidence;¹⁰ so is a ballot-box.¹¹ Books of science are not admissible in evidence to establish the doctrine therein affirmed, except in case of works of the exact sciences. Books on surgery are not admissible.¹² The time of rising and phase of the moon on a certain day may be proved by the introduction of an almanac.¹³ A newspaper advertisement signed by

¹ *Mutual Life Ins. Co. v. Anthony*, 19 N. Y. State Rep. 38.

² *Nadau v. White River L. Co.*, 76 Wis. 120.

³ *Crim v. Fleming*, 123 Ind. 438.

⁴ 87 Ala. 123.

⁵ But see *American Union Tel. Co. v. Daughtry* (Ala.), 7 S. Rep. 660.

⁶ *Bridgman v. Corey*, 62 Vt. 1; *Com. v. McCarthy*, 152 Mass. 577; *Com. v. Doughty*, 139 Pa. St. 383; *Sage v. State*, 127 Ind. 15.

⁷ *McGinty v. Henderson*, 41 La. Ann. 382.

⁸ *Ellis v. Simpkins*, 81 Mich. 1.

⁹ *Northern R. Co. v. Chandler* (Ga.),

10 S. E. Rep. 586; *Gorman v. Minneapolis & St. L. R. Co.*, 78 Iowa, 509; *Hun v. Michigan C. R. Co.*, 78 Mich. 513; *Lincoln v. Smith* (Neb.), 45 N. W. Rep. 41; *Hall v. German*, 37 N. Y. State Rep. 320; *Chicago, B. & Q. R. Co. v. Johnson*, 36 Ill. App. 564.

¹⁰ *Gibson v. Trinity County*, 80 Cal. 359.

¹¹ *Hunnicut v. State*, 75 Tex. 233.

¹² *St. Louis, A. & T. R. Co. v. Jones* (Tex.), 14 S. W. Rep. 309; *Fox v. Peninsular W. D. & C. Works*, 84 Mich. 676.

¹³ *Mobile & B. R. Co. v. Ladd*, 92 Ala. 287.

the name of a firm is evidence against them as to matters therein stated.¹ So a bill-head showing the names of the partners composing a firm is admissible to show the actual partnership, although not shown to have been presented to any of the firm.² So a market report is admissible to show the price of produce at the place where published, at or near the time of sales;³ and a hotel register is admissible in rebuttal of testimony that a certain person had stopped at the hotel at a certain period. So the record on a tombstone more than fifteen years old is admissible to impeach the testimony of a witness that a son was the youngest of a family.⁴

IX. BOOKS OF CORPORATIONS AS EVIDENCE.

§ 31. *In general.*—(a) Entries on the books of a corporation, when the acts recorded are of a public nature and such entries have been made by the proper officer, are deemed to be relevant facts in proving the organization and the existence of the corporation and the regularity of the corporate proceeding, and for this purpose are admissible in evidence either for or against the corporation; but when such entries relate to the private transactions of the company, they are not deemed to be relevant except in actions between the members.⁵

(b) Where the books of a corporation containing a record of its votes and acts are kept by the proper officer, they are evidence of its acts and proceedings.⁶ Thus, the books of a corporation are admissible to show the fact of a party being a stockholder, the number of shares which he holds and their value, and any other transaction between him and the company. The report of commissioners appointed to take subscriptions of stock is admissible to show the amount of cash paid in.⁷

(c) A rule-book of an employing company containing the rules which were in force is admissible.⁸ Thus, the rules of a

¹ *Wright v. Carman*, 47 N. Y. State Rep. 125. *Wheat*. 420; *Hager v. Cleveland*, 32 Md. 476.

² *Knight v. Richter*, 11 Mont. 74.

⁶ *McHorn v. Wheeler*, 45 Pa. St. 32;

³ *Western Wool Com. Co. v. Hart* (Tex.), 20 S. W. Rep. 130.

Howard v. Glenn (Ga.), 11 S. E. Rep. 610; *Wiley v. Athol*, 150 Mass. 426.

⁴ *Gehr v. Fisher*, 143 Pa. St. 311.

⁷ *Hatch v. Attrill*, 118 N. Y. 383; 29

⁵ *Angell & Ames on Corp.*, §§ 679, 681; *McFarlan v. Triton Ins. Co.*, 4 Denio, 392; *Owings v. Speed*, 5

N. Y. State Rep. 14.

⁸ *Parker v. Georgia P. R. Co.*, 83 Ga. 539.

railroad company applicable to the service of an injured employee and the operation of the engine are admissible in evidence in an action by him for damages caused by the engineer's moving the engine in violation of the rules.¹

(d) A train report sheet showing the movement of trains upon a railroad, made in the established course of business of the railroad company, and giving information, every step of the gathering, transmission and entry of which is an act performed by some person in the line of his duty and in the usual course of his employment under a sanction tending to make his statements true, and so connected with and dependent upon each other as to form parts of one transaction, is competent evidence for the railroad company, as constituting acts rather than declarations. So entries made by a train-dispatcher upon a sheet kept at the terminus of the railroad, from telegraphic messages sent from a station on the road, are admissible without proving them by the operator who sent such messages.²

(e) The record of a beneficiary association is *prima facie* evidence in respect to the rights of its members.³ The report of an insurance company to the state insurance department is competent to show the amount which would be realized by an assessment levied according to the terms of the certificate.⁴

(f) The record book of a corporation is admissible to show that persons sued for a failure of the corporation to file its annual certificates were stockholders.⁵ In an action by a corporation against a stockholder or trustee, books of account of the corporation are not admissible to establish an account between them.⁶ As a general rule, however, books of a corporation are evidence in actions between it and its stockholders,⁷ and in actions against the corporation;⁸ as to prove the organization of the company;⁹ to prove the acceptance

¹ Dugan v. Chicago, St. P., M. & O. R. Co. (Wis.), 55 N. W. Rep. 894.

⁶ Rudd v. Robinson, 126 N. Y. 113; 36 N. Y. State Rep. 500.

² Donovan v. Boston & M. R. Co., 158 Mass. 450.

⁷ Wheeler v. Walker, 45 N. H. 355; Chase v. Sycamore, etc. R. Co., 38 Ill. 215.

³ Bagley v. Grand Lodge A. O. U. W., 132 Ill. 498.

⁸ Tuskaloosa v. Wright, 11 Ala. 230; Philadelphia, etc. R. Co. v. Hickman, 28 Pa. St. 318.

⁴ O'Brien v. Home Ben. Soc., 117 N. Y. 310; 27 N. Y. State Rep. 326.

⁵ Congdon v. Winson, 17 R. I. 236.

⁹ Rider v. Alton, etc. R. Co., 13 Ill. 516.

of its charter or amendments thereto;¹ to show what resolutions were passed or votes were taken at a meeting of the stockholders or directors;² and who were elected as directors, officers, etc., of the corporation.³

(g) As a general rule the books of a corporation are not evidence in its favor against strangers.⁴ But they are the proper evidence of its corporate acts; and while they are in existence and can be produced, parol evidence is inadmissible to prove the acceptance of the charter or what persons are members of the corporation.⁵

(h) Where it becomes important to show that a certain resolution was passed at a meeting of the stockholders or directors, the records, if any, must be produced, or notice to produce them must be given, before secondary evidence of their contents will be admitted. So where the question is as to whether a certain person is a stockholder of a certain corporation, the stock-books of the corporation should be produced.

(i) The books of a corporation are admissible in an action against strangers to prove the election of its officers, and that the corporation had complied with the previous requisitions of their charter, and that it had a legal existence.⁶ The book of a corporation must be identified, and it must be shown that the book was kept and the entries were made by the proper officer.⁷ The records of a corporation are admissible to show dates of corporate acts,⁸ and that a party is a stockholder.⁹

(j) In an action on a Bohemian oat note, the annual reports of the Bohemian Oat & Cereal Company, filed in the office of the secretary of state, are admissible upon the question of fraud in the procuring of the note.¹⁰

¹ Coffin v. Collins, 17 Me. 440.

⁶ Wood v. Jefferson County Bank.

² Alabama, etc. R. Co. v. Nabors, 37 Ala. 489.

9 Cow. 194.

³ Wood v. Jefferson County Bank, 9 Cow. 194.

⁷ Highland T. Co. v. McKeen, 10 Johns. 154.

⁴ Hagar v. Cleveland, 36 Md. 476; Connecticut Life Ins. Co. v. Schwenck, 94 U. S. 593.

⁸ Morris v. Morton, 14 Ky. L. Rep. 360.

⁵ Coffin v. Collins, 17 Me. 440; Hudson v. Carman, 41 id. 84; Cabot v. Given, 45 id. 144.

⁹ Leggett v. Glenn, 51 Fed. Rep. 381. But see Taussig v. Glen, id. 409.

¹⁰ Smith v. Mott, 70 Hun, 597; 53 N. Y. State Rep. 346.

§ 32. **Records of corporations.**— (1) The records of a corporation are chiefly of three classes: First. Those required by law—such as subscription books for stocks, registers of stockholders, annual reports, etc. Second. Minutes of deliberate proceedings, which are properly made at the meetings of the corporation and of boards and committees. Third. Account-books and other books of entries kept by the officers or agents of the corporation. Where the record itself constitutes the act—as in the case of a subscription for stock in the commissioners' books, or the making of annual reports, or the adoption of a municipal by-law,—the fact to be proved, when directly in issue, is the existence of the statutory record.

(2) Whenever the action of a deliberate body, whether that of the corporation at large, its board or a committee, is competent to be proved, whether in favor of or against the corporation, its officers, members or strangers, the contemporaneous corporate record of their action is competent,¹ though not always alone sufficient. Thus, the act of organizing may be proved in favor of the corporation or creditors, and against members and strangers, by the books.

(3) To render the rules for conduct of a carrier's employees, and a notice to passengers, admissible in evidence in justification of an employee's conduct in attempting to comply and enforce compliance therewith, it is not necessary to show that either was known to the passengers.²

(4) The rules of a railroad company regarding the management of trains in its yard are admissible in an action by one of its employees against another company for injury from one of its trains running in such yard.³

§ 33. **Against whom competent.**— In general a resolution or other deliberate act of a corporation may be proved in its own favor, or in favor of a stranger, against any one who takes issue upon it. Thus, where the existence of a corporation, depending on organization under a general law, or an acceptance of a charter, is denied, or where any act of the corporation is

¹ *Grant v. Henry Clay Co.*, 80 Pa. Mass. 371; *Southern K. R. Co. v. St.* 208; *Rayburn v. Eldon*, 43 Ala. Pavey, 48 Kan. 452.

700.

² *O'Neill v. Lynn & B. R. Co.*, 155 Hudson R. R. Co., 131 N. Y. 594; 42 N. Y. State Rep. 41.

³ *Noonan v. New York Cent. &*

denied, the minutes of the corporation are competent to prove the fact. Between the members of a corporation the corporate books are of the nature of public books.¹

§ 34. Minutes proved by parol when.—The records of the corporate proceedings of a corporation are not generally produced on the trial. Where their proceedings are collaterally or incidentally in issue, parol evidence is equally primary; but whenever the action or defense is founded directly on the act or proceeding in question, or when a written act or resolution is pleaded and in issue, or when the contents of the record were communicated, and the terms of the communication is the material fact, the records or minutes must be produced or accounted for before parol evidence can be adduced.

§ 35. Authentication of corporate records.—To introduce corporate records in evidence, their character as such must be properly shown by the secretary or other officer who made the record, or by a witness who can testify that they are the records of the corporation; that they have been regularly kept by the proper officer or by some person in his necessary absence; that they come from the proper custody; and that he knows of his own knowledge that the entries offered are correct records of the transaction they purport to record, or that the entries are in the handwriting of a person who was the proper recording officer, or that the book containing them had been handed down in actual and continuous use in the corporation as the guide and authority of its officers.² Rough notes taken by the recording officer at the meeting for the purpose of being afterward extended in the books are, until so extended, competent in place of a formal record;³ and, if lost before being entered, parol evidence of the transactions of the meeting is competent.⁴ Proof of loss and notice to produce are necessary to lay a foundation for secondary evidence.⁵

§ 36. Parol evidence to vary corporate minutes.—It seems that parol evidence cannot be given to enlarge or contradict the terms or meaning of proceedings which are recorded of a

¹ 1 Greenl. Ev., § 548.

³ *Waters v. Gilbert*, 2 Cush. 27.

² 1 Greenl. Ev., § 483; 2 Phil. Ev., § 442; 1 Whart. Ev., § 639; *Hathaway v. Inhabitants of Addison*, 48 Me. 440.

⁴ *Wallace v. First Parish*, 109 Mass. 264.

⁵ *Partridge v. Badger*, 25 Barb. 173.

municipal or public corporation kept pursuant to law; and in general, where the law for the purpose of preserving authentic evidence prescribes the keeping of official minutes of public proceedings of a corporate nature, parol evidence is not competent to contradict the minutes.¹ But it is different as to the minutes of a private corporation in an action between the corporation and a stranger.

§ 37. **Accounts and business entries.**—Accounts of the transactions of a private corporation had through agents and officers are competent between members and between the corporations and members on any question which concerns them in their interest as such,² and between third persons on an issue in respect to the condition and solvency of the corporation. Except as above, the evidence stands on the same footing as the accounts of individuals and firms.

¹ *People v. Zeyst*, 23 N. Y. 140.

² *Hubbell v. Meigs*, 50 N. Y. 480.

CHAPTER XIV.

HEARSAY EVIDENCE (CONTINUED).

RES GESTÆ.

I. OF THE RES GESTÆ.

- § 1. In general.
- 2. Tests for determining when a declaration is.
- 3. Continuing circumstances, when *res gestæ*.
- 4. Declarations of agent or representative.
- 5. Illustrations.
- 6. Statement of party injured to his physician and others.
- II. DECLARATIONS OF ASSIGNOR AGAINST ASSIGNEE.
- 7. In general.
- 8. Declarations before vendor became owner.
- 9. Vendor of chattels or choses in action.
- 10. Made at time of selling.

- § 11. Vendee must be a purchaser for value to exclude declarations.
- 12. Declarations of assignor for benefit of creditors prior to assignment.
- 13. Illustrations.

III. CONSPIRATORS—DECLARATIONS OF.

- 14. In general.
- 15. Criminal conspiracy.
- 16. Illustrations.
- 17. Declarations as to ownership.
- 18. Acts and declarations as to fraud and fraudulent conveyances.
- 19. Acts and declarations of or in presence of donor, testator or intestate.
- 20. Telephone conversation.

RES GESTÆ.

I. OF RES GESTÆ.

§ 1. **In general.**—I think I may safely say that there are few problems in the law of evidence more unsolved than what things are to be embraced in those occurrences that are designated in the law as the *res gestæ*. It is different in different cases; and it is perhaps not possible to frame any definition which would embrace all the various cases which may arise in practice. It is a general rule of evidence that the declarations and acts of the principal parties to an act, as well as the circumstances surrounding them and accompanying the transaction at the time of the principal fact, may be given in evidence in a controversy between the parties relative thereto, as a part of the *res gestæ*, which are calculated to show the nature of the act,

and are in harmony with it.¹ But in order to be competent they must be immediately connected with the material inquiry involved in the issue, and must have occurred at the time of the transaction. They must be so closely connected with the principal act in point of time as to be spontaneous and voluntary, and to preclude all possible idea of deliberate design.² The declarations or acts must be the natural and inseparable concomitants of the principal fact in controversy, so that they may be presumed to have been induced by the same motive that led to the act itself, and so closely allied thereto in point of time as obviously to form a part of the transaction, and must be calculated to unfold its nature and quality.³ If a declaration is in itself a fact in the transaction, or is made by a person while doing an act, and serves to explain it, it is a part of the *res gestæ*; but if it is merely a recital of a past transaction, it is not.⁴ *Res gestæ* are circumstances, facts and declarations which grew out of the main fact, are contemporaneous with it, and serve to illustrate its character.⁵ It is only when the thing done is equivocal, and it is necessary to render its meaning clear, and expressive of a motive or object, that it is competent to prove declarations accompanying it, as falling within the class of *res gestæ*.⁶ In a question of settlement, the pauper's declarations when in the act of removing are admissible.⁷ So the acts and sayings of a constable at the time of a levy are admissible in an action against the sureties on his bond for neglecting to make a return thereof.⁸ Everything is a part of the *res gestæ* which attended and was immediately connected with an act done, so nearly in point of time as to preclude the idea that the act

¹ Jones v. Rigby, 41 Minn. 530; Corbett v. St. Louis, I. M. & S. R. Co., 26 Mo. App. 621; Lindauer v. Meyborg, 27 id. 181; Baughan v. Brown, 123 Ind. 115; Monroe v. Snow, 131 Ill. 126.

² McKay v. Lasher, 121 N. Y. 477; 81 N. Y. State Rep. 690; Jones v. Layman, 123 Ind. 569; Savannah, F. & W. R. Co. v. Holland, 82 Ga. 257.

³ Webber v. Hoag, 55 Hun, 605; 28 N. Y. State Rep. 630; People v.

O'Neil, 20 N. Y. State Rep. 754; 112 N. Y. 355; Rains v. State, 88 Ala. 91; Glass v. Bennett, 89 Tenn. 478; Crooks v. Bunn, 136 Pa. St. 368.

⁴ Bank v. Kennedy, 17 Wall. 19; Still v. Reese, 47 Cal. 294.

⁵ Sweet v. Wright, 57 Iowa, 510.

⁶ Nutting v. Paige, 4 Gray, 584.

⁷ Richmond v. Thomaston, 38 Me. 232.

⁸ Dobbs v. Justices, 17 Ga. 624.

was done or the statement made for the purpose of making evidence for the party; and it is for the jury to determine whether they were made without artifice or premeditation.¹

§ 2. **Tests for determining when a declaration is.**—It is not always easy to determine when declarations may be received as part of the *res gestæ*, and the cases upon this subject in this country and in England are not always in harmony. The cases of *Commonwealth v. McPike*² and *Insurance Co. v. Mosley*³ are extreme cases upon one side. The case of *Regina v. Bedingfield*⁴ is an extreme case upon the other side. In *Lund v. Tyngsborough*,⁵ in view of the frequent recurrence of questions in regard to the admission of declarations claimed to be part of some *res gestæ*, the court undertook to set forth and illustrate the principles and tests by which such questions must be determined, and among other things said, when the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations as a part of the transaction, and the tendency of the contemporary declarations as a part of the transaction to explain the peculiar fact, distinguish this class of declarations from mere hearsay. Such a declaration derives credit and importance as forming a part of the transaction itself, and is included in the surrounding circumstances, which may always be given in evidence to the jury with the principal fact. There must be a main or principal fact or transaction; and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it. In *Commonwealth v. Hackett*,⁶ upon a trial for murder, a witness testified that at the moment the fatal stabs were given he heard the victim cry out, "I am stabbed," and he at once went to him and reached him within twenty seconds after that, and then heard him say, "I am stabbed—I am gone—Dan Hackett has

¹ *Hart v. Powell*, 18 Ga. 635.

² 3 Cush. 181.

³ 8 Wall. 397.

⁴ 14 Cox's Cr. Cas. 341.

⁵ 9 Cush. 36.

⁶ 2 Allen, 136.

stabbed me." This evidence was held competent as part of the *res gestæ*. To make declarations on this ground admissible they must not have been mere narratives of past occurrences, but must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the acts they were intended to explain, and to so harmonize with them as to constitute a single transaction. Declarations which are received as part of the *res gestæ* are to some extent a departure from or an exception to the general rule, and when they are so far separated from the act which they are alleged to characterize that they are not part of that act or interwoven into it by the surrounding circumstances, they are no better than any other unsworn statements made under any other circumstances.¹ Thus, on a trial for murder, a declaration of the deceased, made at the time of and during the affray and immediately after, is admissible as part of the *res gestæ*.² But evidence of what a person assaulted said to his wife when she first reached him after he was shot, as to who shot him, is not part of the *res gestæ*.³

§ 3. Continuing circumstances, when *res gestæ*.—Proof of what a person said at the time of doing an act is admissible as part of the *res gestæ*, to show its character, where it is necessary to inquire into the general nature of the act or the intention of the party who did it; that is to say: Declarations springing out of the transaction, elucidating it, voluntary and spontaneous, and made at the time of the transaction, or so near to it as to reasonably preclude the idea of deliberate design, and not a narrative of a past occurrence, are to be regarded as part of the *res gestæ*.⁴ But while, as a general rule, declarations, to be admissible as part of the *res gestæ*, must be contemporaneous with the event constituting the principal fact, where there are connecting circumstances they may form part of the whole *res gestæ*, even when made some time afterwards. That is to say, a declaration, to be a part of the *res gestæ*, need not be coincident in time with the main

¹ Waldele v. N. Y. C. & H. R. Co., Schneider, 21 Wash. L. Rep. (D. C.) 95 N. Y. 274. 45.

² State v. Henderson (Oreg.), 32 ³ Loyd v. State, 70 Miss. 251.

Pac. Rep. 1030; United States v. ⁴ Archer v. Helm, 69 Miss. 730.

fact proved, if the two are so closely connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause.¹ Thus, a declaration of an unmarried woman that she intended to commit suicide, made the day before her death, in a conversation relating to her pregnancy, which continued until her death, is not inadmissible, on a trial for her murder, as made at a time remote from that of her death.² So the whole conduct of a county, before, at the time and after the issue of its bonds, may be shown, to aid in determining under what statute and by what authority the county proceeded in the issue of the bonds.³

§ 4. Declarations of agent or representative.—Whether self-serving declarations are admissible or not depends upon whether they were made under such circumstances that they are presumed to be instinctive; but if they may have been the result of thought or deliberation they are not admissible.⁴ In case a principal is liable for the tort of his agent, statements of his agent, made during the commission of the wrong, are admissible as against the principal; but it is essential that the statements or admissions should be part of the transaction to which they relate,⁵ and while actually engaged in an authorized act, or so soon thereafter as to constitute a part of the *res gestæ*.⁶ Thus, the declarations of an attorney will not bind his client unless within the scope of his authority in the proceedings in which he is engaged.⁷ Statements made by a book-keeper authorized to furnish them by his principal, from books kept by him, are admissible against the principal.⁸

¹ State v. Harris, 45 La. Ann. 62; Missouri P. R. Co. v. Baier (Neb.), 55 N. W. Rep. 913; Miller v. State (Tex.), 21 S. W. Rep. 925; Jamison v. People, 145 Ill. 357, People v. Pallister, 138 N. Y. 601; 51 N. Y. State Rep. 725; Ortiz v. State, 30 Fla. 256; Cantier v. State (Tex.), 31 S. W. Rep. 255.

² Com. v. Trefethen, 157 Mass. 180.

³ Knox County v. New York N. Nat. Bank, 147 U. S. 91.

⁴ Whitaker v. Eighth Ave. R. Co., 51 N. Y. 295; Waldele v. Railroad Co., 95 id. 274; Martin v. Railroad Co., 103 id. 626.

⁵ Lahey v. Ottman, 73 Hun, 61; 56 N. Y. State Rep. 108.

⁶ La Rue v. St. Anthony & D. E. Co. (S. D.), 54 N. W. Rep. 806.

⁷ Lewis v. Duane, 69 Hun, 28; 52 N. Y. State Rep. 818; O'Brien v. Weiler, 68 Hun, 64; 52 N. Y. State Rep. 17; Myers v. Cohn, 53 N. Y. State Rep. 223 (1893); McElwee Mfg. Co. v. Trowbridge, 68 Hun, 28; 52 N. Y. State Rep. 64.

⁸ Donovan v. Clark, 52 N. Y. State Rep. 358; 138 N. Y. 631.

So the statement of the general agent of a corporation, in the course of his employment, of a fact within his official knowledge, relating to the *status* of a matter intrusted to him, is admissible in behalf of a person with whom the corporation was dealing at the time.¹ But the declarations of an agent, although accompanying his acts, are no evidence of the extent of his authority.²

§ 5. Illustrations.—(a) The declarations and admissions of agents may be proved as part of the *res gestæ*, but only when made during the agency, and in regard to a transaction depending at the very time so as to constitute a part of the act.³ They must also have been made while acting within the scope of his authority, *dum fervet opus*.⁴ Thus, where a husband was general agent of his wife, and when he bought fertilizers declared that they were for use on her farm, such declaration is independent evidence that they were bought for that purpose.⁵

(b) The declarations of a person procuring a mortgage to secure an antecedent debt, made on his way to procure it, are admissible as part of the *res gestæ* against the mortgagee on the question of fraud and duress, irrespective of the agency of such person for the mortgagee.⁶

(c) Evidence of what was said by a ticket agent to a passenger upon the purchase of his ticket as to stop-over privileges is admissible where the ticket was silent as to said privileges.⁷ They cannot be admitted on this ground, if subsequently made, as a narrative of a past act, even though they relate to the official duty of the declarant. It must affirma-

¹ Agricultural Ins. Co. v. Potts, 55 N. J. L. 158; Tryon v. White & C. Co., 62 Conn. 161; Hitchings v. St. Louis, N. O. & O. C. & T. Co., 68 Hun, 33; 52 N. Y. State Rep. 247.

² Dowden v. Cryder (N. J.), 26 Atl. Rep. 941; O'Calaghan v. Barrett, 66 Hun, 633; 50 N. Y. State Rep. 166; Wolf v. Benedict, 65 Hun, 624; 48 N. Y. State Rep. 195; Donaldson v. Everhart, 50 Kan. 718.

³ People v. Sherman, 133 N. Y. 349; Anderson v. Rome, etc. R. Co., 54 N. Y. 334.

⁴ Brackett v. Griswold, 128 N. Y. 644; Bevis v. Baltimore & O. R. Co., 26 Mo. App. 19; Bensley v. Brockway, 27 Ill. App. 410; Southerland v. Wilmington & W. R. Co., 106 N. C. 100; Passaic County Freeholders v. Downie, 54 N. J. L. (25 Vroom), 223. ⁵ Jefferds v. Alvard, 151 Mass. 94. ⁶ Small v. Williams, 87 Ga. 681; Western Union Tel. Co. v. Lydon, 82 Tex. 364.

⁷ New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60.

tively appear that the declaration was made at the time and not afterwards.¹

(*d*) Statements of an agent are admissible in evidence against the principal only when made touching matters of business which he is transacting when they are made, and which are within the scope of his authority.²

(*e*) Agency cannot be proved by the declarations of the alleged agent.³ Nor can it be proved by the testimony of the agent in all cases.⁴

(*f*) The report of an employee of a railroad company as to the killing an animal on the track is not admissible as evidence on behalf of the company, unless it was shown that it was the duty and business of the employee to make such report, and that it was made contemporaneously with the occurrence.⁵

(*g*) Only general officers can bind corporations by their declarations and admissions, and then only when engaged in the transaction of business in the line of their duty.⁶

(*h*) Where corporate agents are intrusted with the transaction of business requiring continuous negotiations, the authority of the agent to bind his principal by his statements does not terminate until the negotiations are at an end.⁷ Statements of a foreman to a laborer under him are admissible.⁸ So are the statements of an agent negotiating a lease.⁹ So are statements of a conductor to a passenger as to baggage.¹⁰

¹ Whitaker v. Eighth Ave. R. Co., 51 N. Y. 299.

² Sioux Valley State Bank v. Kellogg, 81 Iowa, 124; Freiberg v. Brunswick Balke-Collender Co. (Tex. App.), 16 S. W. Rep. 784.

³ Sax v. Davis, 81 Iowa, 692; Pepper v. Caines, 133 Pa. St. 114; Gibson v. J. Snow Hardware Co., 94 Ala. 346; North v. Metz, 57 Mich. 612; Forbes v. Haas, 32 N. Y. State Rep. 107 (1890).

⁴ Deane Steam Pump Co. v. Green, 31 Mo. App. 269.

⁵ Jacksonville, T. & K. W. R. Co. v. Wellman, 26 Fla. 344.

⁶ Chicago & St. L. R. Co. v. Ash-

ling, 34 Ill. App. 99; Post-Express Printing Co. v. Coursey, 57 Hun, 585; 32 N. Y. State Rep. 748; Abbott v. Seventy-six L. & W. R. Co., 87 Cal. 323; Reynolds v. Iowa & N. Ins. Co., 80 Iowa, 563; Goodbar v. City Nat. Bank, 78 Tex. 461; Phillip v. Herndon, 78 id. 378; Marchaud v. Griffon, 140 U. S. 516.

⁷ Cleveland, C. C. & I. R. Co. v. Closser, 126 Ind. 348; 43 Alb. L. J. 209.

⁸ Gulf, C. & S. F. R. Co. v. Wilson, 23 Am. St. Rep. 345.

⁹ Corson v. Berson, 86 Cal. 433.

¹⁰ Hampton v. Pullman Palace Car Co., 42 Mo. App. 134.

(i) The declarations of a person in charge of a business concerning the business ordinarily transacted there, are admissible to bind the principal.¹ So are the declarations of a person selling machinery, made at the time of the sale.² But the statement of an opinion by an agent is not *res gestæ*.³

(j) The declarations of a real-estate broker employed to sell land, while on the land attempting to sell it, are admissible.⁴ So the statement of a street-car driver, just after he had stopped the car and while a boy injured was still under it, are admissible.⁵ So are those of an engineer;⁶ and those of a track-walker to a section boss.⁷

(k) Declarations of an agent made concerning business of his principal, contained in letters to third persons, if relevant are competent.⁸ But declarations of an agent made after a transaction is fully completed and ended are hearsay, and not admissible as part of the *res gestæ*.⁹

(l) As a general rule, statements made by the husband in the absence of the wife are not binding upon her.¹⁰ But it is different where both husband and wife claim in common by adverse possession.¹¹ And the declarations of a husband in purchasing land in his own name, where he has the deed made to his wife, are admissible.¹²

¹ Ingalls v. Averitt, 34 Mo. App. 371.

² Davis v. Sweeney (Iowa), 45 N. W. Rep. 1040; Updyke v. Wheeler, 37 Mo. App. 680; Raham v. Deig, 121 Ind. 283.

³ De Soucey v. Manhattan R. Co., 39 N. Y. State Rep. 79 (1891).

⁴ Lockwood v. Rose, 125 Ind. 588; Holmes v. Turner's Falls Lumber Co., 15 Mass. 535.

⁵ Quincy Horse R. Co. v. Gause (Ill.), 27 N. E. Rep. 190; Koetter v. Manhattan El. R. Co., 36 N. Y. State Rep. 611.

⁶ Hermes v. Chicago & W. R. Co., 80 Wis. 590; Hooker v. Chicago, M. & St. P. R. Co., 76 id. 542.

⁷ Texas & P. R. Co. v. Lester, 75 Tex. 56; Goriman v. Minneapolis & St. L. R. Co., 78 id. 509. But see

Beasley v. San Jose Fruit Packing Co., 92 Cal. 388.

⁸ Pennsylvania Mut. Life Ins. Co. v. Keach, 32 Ill. App. 427; 134 Ill. 583.

⁹ Wise v. Grant, 59 Hun, 466; 37 N. Y. State Rep. 39; Stone v. Poland, 58 Hun, 21; 33 N. Y. State Rep. 437; Cake's Appeal, 110 Pa. St. 65; Chattanooga R. R. & C. R. Co. v. Liddell, 85 Ga. 482; Chicago & St. L. R. Co. v. Ashling, 34 Ill. App. 99; Hellmuth v. Katschke, 35 id. 21; Sherman v. Oneonta, 59 Hun, 294; 36 N. Y. State Rep. 587. But see Central Railroad & Bkg. Co. v. Skellie, 90 Ga. 41.

¹⁰ Koehler v. Miller, 21 Ill. App. 557.

¹¹ Hurley v. Lockett, 72 Tex. 262.

¹² Conlin v. Masecar, 80 Mich. 139; Holmes Organ Co. v. Pelitt, 34 Mo. App. 536.

(m) Oral declarations of counsel in a judicial inquiry are not admissible in evidence as admissions of fact so as to bind his client.¹

(n) The admissions of an administrator are competent if made while engaged in the performance of some act relating to the estate; but such act should be such as called for and made the declaration pertinent, and the declaration should accompany such act so as to constitute a part of the *res gestæ*.²

§ 6. **Statements of party injured to his physician and others.**— While, as a general rule, declarations made out of court by a party are not admissible as evidence in his behalf, his statements to his attending physician of the nature of the symptoms of his malady or suffering have quite uniformly been held admissible. And in some cases evidence of a non-medical witness that a person who had received an injury manifested pain by screaming is competent because it is apparently involuntary and may corroborate what appears to be his condition. The rule of the admissibility of statements made to physicians by persons who have been physically injured or are suffering from disease is not an unqualified one. They must relate to present and not past pain and suffering.³ And while it was held in *Madison v. N. Y. C. R. Co.*⁴ that expressions of pain and suffering made by the injured person to physicians when they were examining him were competent evidence, notwithstanding the examination was made by them with a view of testifying as to the result of it in a suit then pending, the contrary was held in *Grand Rapids & Ind. R. Co. v. Huntley*,⁵ and in *Jones v. Pres. etc. of Portland*.⁶ It may be seen that when attended by a physician for the purpose of treatment there is a strong inducement for the patient to speak truly of his pain and suffering, while it may be otherwise when medically examined for the purpose of creating evidence in his own behalf. It is for this reason that the weight of judicial authority is to the effect that the statements ex-

¹ *Anderson v. McAleenan*, 29 N. Y. State Rep. 406 (1890); *Crockett v. Althouse*, 35 Mo. App. 404; *Shiner v. Abbey*, 77 Tex. 1.

² *Davis v. Gallagher*, 55 Hun, 593; 29 N. Y. State Rep. 882.

³ *Towle v. Blake*, 48 N. H. 92.

⁴ 35 N. Y. 487.

⁵ 38 Mich. 538.

⁶ 88 Mich. 598.

pressive of their present condition are permitted to be given as evidence only when made to a physician for the purpose of treatment by him.¹ In *Davidson v. Cornell* the court say: "In the present case the declarations of the plaintiff were not instinctive, nor were they made to the physician with a view to medical treatment. They consisted not of exclamations of present pain or suffering, but were the plaintiff's statements, so far as called for by the doctor, of the effect upon him of the injury and the consequences which had followed in such respects from the time it occurred, a period of nearly fifteen months. This was hearsay, and is very different from that of a medical witness as to the expressions by a patient or person suffering from injury or disease indicating pain or distress or expressive of the present state of his feelings in that respect."

Bare exclamations or expressions of present pain or suffering by an injured person, at and after the injury, are admissible in an action for the injury;² and the fact that such exclamations are made during the pendency of the suit for damages for the injury complained of does not affect their admissibility.³ Thus, in an action for malpractice, evidence of exclamations of suffering by the injured person is admissible.⁴ And the mere lapse of time between the exclamations and the injury is not the test of admissibility.⁵ The bald statement, made long after an injury by the party injured to a third person, that he suffers from pain, ought not to be admitted as in any degree corroborative of his testimony as to the extent of his pain. Prior to the time when parties were allowed to be witnesses, the rule in this class of cases per-

¹ *Roche v. Brooklyn City, etc. R. Co.*, 105 N. Y. 294; 7 N. Y. State Rep. 361; *Davidson v. Cornell et al.*, 132 N. Y. 228; 43 N. Y. State Rep. 887; *Barker v. Masin*, 11 Allen, 322; *Fay v. Harland*, 128 Mass. 244.

² *Cleveland, C. C. & St. L. R. Co. v. Prewitt (Ind.)*, 33 N. E. Rep. 267; *Girard v. Kalamazoo*, 93 Mich. 610; *Chicago, St. L. & P. R. Co. v. Spilker*, 32 Am. L. Reg. 753.

³ *Kansas City, Ft. S. & M. R. Co. v.*

Stoner, 51 Fed. Rep. 649; *Schuler v. Third Ave. R. Co.*, 48 N. Y. State Rep. 663 (1892).

⁴ *Link v. Sheldon*, 136 N. Y. 1; 48 N. Y. State Rep. 820; *Hewitt v. Eisenbart (Neb.)*, 55 N. W. Rep. 252.

⁵ *State v. Mulkern (Me.)*, 26 Atl. Rep. 1017; *State v. Bedard (Vt.)*, 26 Atl. Rep. 719. But see *People v. Stewart (Cal.)*, 32 Pac. Rep. 8; *Richards v. State*, 36 Neb. 71.

mitted evidence of this nature.¹ These cases show that the evidence was not confined to the time of the injury, or to the mere exclamations of pain. The admissibility of the evidence was put upon the necessity of the case, as being the only means by which the condition of the sufferer as to enduring pain could in many instances be proved. Substantially, the same class of evidence was admitted in England, and for the same reason.

Now evidence of exclamations indicative of pain made by the party injured is admissible when it is of a nature which substantially corroborates the party injured as to his condition. But there is a clear distinction between an exclamation of pain and simple declarations of a party that he was then suffering pain but giving no other indications thereof. Evidence of exclamations, groans and screams is now permitted, more upon the ground that it is better and clearer and a more vigorous description of the then existing physical condition of the party by an eye-witness than could be given in any other way. It characterizes and explains such condition. Thus, in *Hagenlocker v. C. I. & Brooklyn R. Co.*,² it was shown that the foot was very much swollen, and so sore that the sheet could not touch it. How was the condition of soreness to be shown better than by the statement that, when so light an article as a sheet touched the foot, the patient screamed with pain? It was an involuntary and natural exhibition and proof of the existence of intense soreness and pain therefrom. True, it might be simulated, but this possibility is not strong enough to outweigh the propriety of permitting such evidence as fair, natural and original corroborative evidence of the party as to his then physical condition. Its weight and propriety are not, therefore, now sustained upon the old idea of the necessity of the case. But evidence of simple declarations of a party, made sometime after the injury, and not to a physician for the purpose of being attended professionally, and simply making the statement that he or she is then suffering pain, is evidence of a totally different nature, is easily stated, liable to gross exaggeration, and of a most dangerous tendency, while the former necessity for its admission has wholly ceased.

¹ *Caldwell v. Murphy*, 11 N. Y. 416; ² 99 N. Y. 136.
Werly v. Persons, 28 id. 345.

As is said in *Roche v. Brooklyn City & N. R. Co.*,¹ "the necessity for giving such declarations in evidence, where the party is living and can be sworn, no longer existing, and that being the reason for its admission, the reason of the rule ceasing, the rule itself, adopted with reluctance and followed cautiously, should also cease." With the rule as herein announced there can be no fear of a dearth of evidence as to the extent of the injury and the suffering caused thereby. The party can himself be a witness, if living, and, if dead, the suffering is of no moment, as it cannot be compensated for in an action by the personal representative, heirs or widow, and the exclamations of pain, the groans, the sighs, the screams, can still be admitted. But it seems that the bald statement, made long after the injury, by the party, that he suffers from pain, cannot be admitted as in any degree corroborative of his testimony as to the extent of his pain. And it is now definitely settled that a party cannot support his own testimony by proof of declarations to the same effect made to persons other than a physician who is at the time in attendance professionally. But evidence of exclamations which are natural concomitants and manifestations of pain and suffering are still admissible, because regarded as voluntary and natural expressions, which a witness may describe for the same reason that he may the appearance of the party. There is no imaginary line somewhere between a few hours and a few days, or a few weeks, on one side of which declarations in favor of a party are admissible in evidence, while on the other they are inadmissible. Unless such complaints form a part of the *res gestæ* they cannot be admitted. And if they are so far detached from the occurrence as to admit of deliberate design and be the product of a calculating policy on the part of the actors, then they cannot be regarded as part of the *res gestæ*.²

II. DECLARATIONS OF ASSIGNORS AGAINST ASSIGNEE.

§ 7. In general.—It is a proposition that cannot be questioned that a grantor cannot, after the execution of his deed, lawfully do any act to prejudice the rights of his grantee, nor

¹ 105 N. Y. 294; 7 N. Y. State Rep. R. Co., 130 N. Y. 654; 41 N. Y. State Rep. 329.

² *Kennedy v. Rochester City & B.*

are his declarations, confessions or admissions to be admitted against the grantee. The reason why the declarations or statements of a party are ever admissible is that they affect his title or possession and characterize the same while owner or in possession, and are consequently binding upon the party making the same and his privies. As a general rule, declarations made by a party in possession of real estate, as to his interest or title in the property, may be given in evidence against those who subsequently derive title under him, in the same manner as they could have been used against the party himself if he had not parted with his possession or interest. On the other hand, it is equally well settled that no declaration of a former owner of the property, made after he had parted with his interest therein, can be received in evidence to affect the legal or equitable title to the premises. It is true the rule is well settled, in our own and the English courts, that the declarations of the person in possession of the premises, as to his title, are admissible against the person making the same and all who claim title under him.¹ But in all these cases the possession was that of a person claiming title and acting in accordance with such claim, and not by one disclaiming title, and declaring at the time that his possession was not that of owner but at the will or sufferance of another, the real owner. Thus, declarations made by the grantor of premises, after he has sold the same, even though he continues in the occupation of the same up to the time of making such declarations, are not competent evidence as affecting the rights of the grantee.² But oral admissions made by one who at the time held the title to land, to the effect that he had contracted by parol to sell the same to another, and had received pay therefor, are competent evidence against all persons claiming title under or through him.³ The principle upon which such evidence is received is that the declarant was so situated that he probably knew the truth, and his interests were such that he would not have made the admissions to the prejudice of his title or possession unless they were true. The regard which one so situated would have to his own interest is considered sufficient security against falsehood. In some

¹ *Pitts v. Wilder*, 1 N. Y. 525.

³ *Chadwick v. Fonner et al.*, 69 N.

² *Vrooman v. King*, 36 N. Y. 477. Y. 404.

of the states of the Union and in England, the admission of a prior owner of choses in action and other personal property characterizing or affecting his title are also admitted in evidence upon the same principle against those subsequently taking title from him. But admissions and declarations of the assignor are not competent evidence in favor of the assignee, unless part of the *res gestæ* of an act properly in evidence and relevant to the issue.¹

§ 8. **Declarations before vendor became owner.**— Admissions and declarations made by the assignor before he became owner are wholly incompetent against the assignee, except that, when it is relevant to prove that as owner of the claim he had notice of any fact, declarations made previous to ownership, showing a then present knowledge of the fact, may be, within reasonable limits, evidence to go to the jury tending to show notice at the time when he dealt with or possessed the thing assigned.² The assignor's admissions and declarations, made after he ceased to be owner, are equally incompetent against the assignee, unless the evidence connects the assignee with them; and it makes no difference that the assignment is only as collateral.³ Thus, a mortgagee, having parted with his interest, cannot by his subsequent conduct or admissions bind his assignee.⁴ But if the assignee is only a nominal party suing for the assignor's benefit, they are competent.⁵ If, however, the assignee is the real party in interest, the fact that the action is in the name of the assignor does not render competent his declarations made subsequent to the transfer.⁶ So an assignor's again acquiring possession does not let in declarations made during the renewed posses-

¹ Howard v. Upton, 9 Hun, 434. 289; Eby v. Eby, 5 id. 435; Woodruff v. Cook, 25 Barb. 505; Beville v. Jones, 74 Tex. 148; Scofield v. Spaulding, 54 Hun. 523; 28 N. Y. State Rep. 108; Noyes v. Morris, 56 Hun. 501; 31 N. Y. State Rep. 608; Casto v. Frye, 33 W. Va. 449.

² Bond v. Fitzpatrick, 4 Gray, 89. ⁴ Hann v. Decater (N. J.), 20 Atl. Rep. 657; Smith v. Gillum (Tex.), 15 S. W. Rep. 794; Davis v. Green, 102 Mo. 170.

³ Rawson v. Plaisted, 151 Mass. 71; Towner v. Thompson, 81 Ga. 171; 1 Greenl. Ev., § 190; Taylor on Ev., § 713; Pringle v. Pringle, 59 Pa. St. 5 Eaton v. Carson, 59 Me. 510.

⁶ Freare v. Evertson, 20 Johns. 142.

sion and relating to the former period.¹ It is only where the party making the declarations has, at the time of making them, the title to the property, that such declarations bind his successor in interest. Declarations made before or after that time are not admissible.² Declarations of a grantor subsequent to the execution and to the delivery of a deed are inadmissible to show that it was intended as a mortgage;³ and this is so although when the declarations were made the grantor had not surrendered actual possession of the premises.⁴ So the declarations of one whose land has been sold under execution and purchased by his son is inadmissible to establish a resulting trust in the father's favor.⁵

§ 9. **Vendor of chattels or choses in action.**—The general rule is that a former owner of a chattel or a chose in action who has transferred his interest to another by an absolute sale or assignment cannot, by his subsequent admissions, affect the right of the purchaser. In some cases such admissions may be admissible, but only where there is an identity of interest between the assignor and the assignee, which is deemed to exist where the transfer is merely colorable or nominal, and where a party claims through another by representation, and the declaration is not excluded by some other rule of evidence.⁶ As a general rule, the declarations of a grantor which form no part of the *res gestæ* are not competent to prejudice the title of his grantee, especially when made after the transfer.⁷ In *Gibney v. Marchay*⁸ it was held that the declarations of a party in possession of real property are admissible against the party making them, or his privies in blood and estate, but not competent to attack or destroy a title which is of record. In *Vrooman v. King*⁹ it was also held that declarations made by a grantor of premises after he had sold them, though he continue in the occupation up to the time of making such declarations, were not

¹ *Cornett v. Fain*, 33 Ga. 219; *Tilson v. Terwilliger*, 56 N. Y. 273.

² *Hutchins v. Hutchins*, 98 N. Y. 64.

³ *Jones v. Jones*, 137 N. Y. 610; 51 N. Y. State Rep. 75.

⁴ *Hart v. Randolph*, 142 Ill. 521.

⁵ *Evans v. McKee*, 152 Pa. St. 89. But see *Spencer v. N. Y. & N. E. R. Co.*, 62 Conn. 242.

⁶ *Holmes v. Roper et al.*, 56 N. Y. State Rep. 596 (1894).

⁷ *Cuyler v. McCartney*, 40 N. Y. 221; *Burhans v. Kelly*, 17 N. Y. State Rep. 552 (1888).

⁸ 34 N. Y. 301.

⁹ 36 N. Y. 477.

competent evidence as affecting the rights of his grantee. In *Hutchins v. Hutchins*¹ it was said: "It is only where the party making the declarations has, at the time of making them, the title to the property that such declarations bind his successor." In *McDuffie v. Clark*² it is said: "The declarations of a party in possession are evidence against the party making them, or his privies in blood or estate, not to attack or destroy the title, for that is of record and of a higher and stronger nature, and cannot be attacked by parol evidence. Such admissions are received in evidence simply to explain the character of the possession in a given case." In *Adams v. Davidson*³ the declarations of the assignor before the delivery of the property assigned as to the purpose of the assignment were admitted in evidence. In that case the transaction was incomplete when the declarations were made, as no delivery of the property assigned had taken place. In *Loos v. Wilkinson*⁴ the conveyance was a secret one, and the declarations of the grantors were to the effect that they still owned the property. Such declarations were held competent on the ground that they were a part of the fraud, and it was there said: "They are in the nature of *res gestæ* declarations, and on the question of fraud clearly competent." In *Scofield v. Spaulding*⁵ it was held that, in an action to set aside a conveyance as fraudulent against creditors, declarations of the grantor made after the deed was delivered and recorded, and his testimony in proceedings supplementary to execution, were inadmissible as against the grantee, even though the grantor was in possession under a lease which was claimed to form part of the fraudulent transaction. In *Truax v. Slater*⁶ it was held that the declarations of an assignor of a chose in action forming no part of the *res gestæ* are not competent to prejudice the title of the assignee, whether the assignment be for value or merely for the benefit of creditors, and whether the declarations be antecedent or subsequent to the assignment. In *Tilson v. Terwilliger*⁷ it was held that the declarations of a vendor

¹ 98 N. Y. 64.

² 39 Hun, 170.

³ 10 N. Y. 309.

⁴ 110 N. Y. 195; 18 N. Y. State Rep. 110.

⁵ 54 Hun, 523; 28 N. Y. State Rep. 108.

⁶ 86 N. Y. 630.

⁷ 56 N. Y. 273.

in possession of chattels sold after he has once parted with the possession and then received them from the vendee were hearsay, and that they did not come within the variations from, nor the exceptions to, the rule which excludes hearsay evidence; that they are not the declarations of an assignor of chattels who without a break continues his possession thereof after he has made a real or pretended sale. Such declarations are received as part of the *res gestæ* on the ground that they show the nature, object or motives of the act which they accompany and which are the subject of inquiry. But, to be a part of the *res gestæ*, they must be made at the time of the act done which they are supposed to characterize; they must be intended to unfold the nature and quality of the facts which they are intended to explain; they must so harmonize with those facts as to form one transaction; there must be a transaction of which they are considered a part; they must be concomitant with the principal act, and so connected with it as to be regarded as the result and consequence of co-existing motives. In *Hutchins v. Hutchins*¹ it is held that the declarations of a former owner of property, made before or after the time when he held title, do not bind his successor in interest. In *Adams v. Davidson*² it was held that the declarations of an assignor as to the object of making an assignment, made by him after its execution and while he continued in possession of the property, were evidence against the assignor and creditors claiming under the assignment. In *Cuyler v. McCartney*³ the court say: "For the purposes of this case it is not necessary to hold that, where a transfer is sought to be impeached on the ground that it was fraudulent, the admissions of the assignor while continuing in the possession of the property, not having consummated it by an actual surrender of the property to the transferee, are incompetent as evidence of the fraud."

§ 10. **Made at time of selling.**—While the rule is unquestioned that the mere declarations of a prior holder of a chose in action cannot be given in evidence to affect the title or the rights of a subsequent holder and owner, the rule does not apply where the declarations are made at the time when the

¹ 98 N. Y. 56.

³ 40 N. Y. 235.

² 10 N. Y. 309.

chose in action is negotiated to the person who is seeking to enforce it, as they are thus a part of the *res gestæ*. Declarations thus made qualify, and in some sense attach to, the plaintiff's title. They are not conclusive and may be controverted, and if untrue the real truth may be shown.¹

§ 11. Vendee must be a purchaser for value to exclude declarations.—It seems that a vendee of chattels or an assignee of a chose in action must be a purchaser for value in order to exclude the declarations of a prior party in interest, from whom he derived title made before such parting with his interest. Thus, where an assignee of a chose in action is seeking to collect the same, and the alleged debtor resists payment on the ground of payment, etc., he is entitled to show the declarations of the assignor or vendor made prior to the assignment, in case the assignee is not a purchaser for value. It seems that the rule of evidence applied in *Bond v. Fitzpatrick*² is the proper rule. In that case it was held that in a suit against the maker of a promissory note by one who took it when overdue, the declarations of a prior holder, made while he held the note, after it was due, are admissible in evidence to show payment to such prior holder, or any right or set-off which the maker had against him.³

§ 12. Declarations of assignor for benefit of creditors prior to assignment.—In an action to set aside a general assignment as fraudulent as against creditors, the declarations of the assignor made prior to the execution of the assignment are competent evidence. The relation between the assignor and his assignee creates an identity of interest between them which makes the assignor's declarations evidence against his assignee. But if made subsequent to the assignment and delivery of the property they would be inadmissible.⁴

§ 13. Illustrations.—(1) There does not seem to be any general or universal rule in respect to the admission of evidence of the assignor's acts and declarations against his own interest, made during his ownership. The New York rule, recognized also in the supreme court of the United States, is

¹ *Crain v. Wright*, 46 Ill. 107;
Hayslep v. Gymer, 1 A. & E. 162;
Benjamin v. Rogers, 126 N. Y. 60; 36
 N. Y. State Rep. 393.

² 4 Gray, 89.

³ *Flagler v. Wheeler*, 40 Hun, 129.

⁴ *Kennedy v. Wood*, 52 Hun, 46;
 22 N. Y. State Rep. 132.

that the oral declarations or admissions of the former holder of any chose in action or personal property, even if made before his transfer, are not competent evidence against the transferee, unless there is present identity of interest between them, or the vendee is not a purchaser for value.¹

(2) The rule in some states declares the assignor's acts and declarations against his interest made during his ownership universally competent against all assignees except transferees of negotiable paper. Thus, on the question of ownership of personal property, declarations made by one while in the full possession, control and use of the property are admissible against one claiming under him.² Thus, the declarations and acts of a grantor on putting the grantee into possession of the land are admissible in an action involving the question of the boundary between such land and lands reserved by the deed, where the description cannot be reconciled by the location of a fence marking such boundary when possession was given.³ And a declaration as to the character of a right of way made by a predecessor in defendant's title is admissible in evidence against defendant.⁴

(3) Admissions and declarations of the owner of a note already due, against his own interest, are competent against a subsequent assignee.⁵ So declarations or admissions of a decedent are admissible against one who claims title to the property in controversy by purchase from decedent's administrator,⁶ and also against the decedent's widow.⁷ Thus, the declarations of a decedent binding him, or binding or impairing his estate, are admissible in evidence against his personal representatives where they would have been competent against himself.⁸

(4) Taylor and Greenleaf require evidence of an identity

¹ Freedman's Sav. & T. Co. v. Dodge, 93 U. S. 379; Jones v. East Society, etc., 21 Barb. 174; Luco v. De Toro, 91 Cal. 405; Sparks v. Brown, 46 Mo. App. 529; Banks v. Martin (Tex.), 18 S. W. Rep. 964.

² Maus v. Bome, 123 Ind. 522; Beard v. Minneapolis First Nat. Bank, 41 Minn. 153; Fry v. Feemster, 86 W. Va. 454; Taylor v. Arnold, 13 Ky. L. Rep. 516.

³ Harris v. Oakley, 130 N. Y. 1; 40 N. Y. State Rep. 485.

⁴ Bennett v. Riddle, 150 Pa. St. 420.

⁵ Kane v. Torbit, 23 Ill. App. 311.

⁶ Bush v. Barron, 78 Tex. 5.

⁷ Mississippi County v. Vowels, 101 Mo. 225; Wilson v. Simpson, 80 Tex. 279; Tyres v. Kennedy, 126 Ind. 533.

⁸ Hurlburt v. Hurlburt, 128 N. Y. 420; 40 N. Y. State Rep. 436; Herscher v. Brazier, 38 Ill. App. 654; Barker v. Smith (Mich.), 52 N. W. Rep. 723.

of interest between the assignor and assignee to admit these declarations. (1) That the assignee is the mere agent of the assignor, or (2) that he took title with actual notice of the true state of that of the assignor.¹ In all cases it must appear that they were made before the transfer and against interest.² Thus, declarations made by a person in explanation of the character and extent of his possession of land, and against his interest, are competent against one claiming title under him,³ and as to boundaries.⁴ And whenever the admissions of one having or claiming title to real estate would be competent against him, they are competent against persons subsequently deriving title through or from him.⁵

(5) In an action on a life insurance policy it is competent for the defendant to show that shortly before deceased began to insure his life, witness, at his request, attempted to raise money for him, and, upon informing deceased of his inability to do so, deceased replied that he must have money and would commit suicide if he could not raise it.⁶ So declarations of an insured, after the issue of a certificate to him which gives him a right to change the beneficiary, are admissible against the beneficiary.⁷

(6) In an action by a receiver to set aside a general assignment, the declaration of assignors as to their insolvency before but not after the assignment are admissible both against the assignor and assignee.⁸

(7) Acts and declarations of a vendor in possession after the sale are competent evidence against the vendee on the question of the character and purpose of the sale;⁹ but not to impeach the deed in an action to set aside for fraud and deception.¹⁰

¹ 1 Taylor on Ev. 713; 1 Greenl., § 190.

² Ball v. Loomis, 29 N. Y. 416; Haile v. Morgan, 25 S. C. 601; Jermain v. Denniston, 6 N. Y. 276.

³ Ellis v. Harris, 106 N. C. 395; Shaw v. Starr, 75 Tex. 411; Youngs v. Cunningham, 57 Mich. 153; Johnson v. Cox, 81 Ga. 25.

⁴ Wood v. Fiske, 62 N. H. 173; Hurley v. Lockett, 72 Tex. 262.

⁵ Baird v. Slaight, 55 Hun, 603; 28 N. Y. State Rep. 667.

⁶ Smith v. National Ben. Soc., 38 Hun, 67; 123 N. Y. 85.

⁷ Steinhause v. Preferred Mut. Acc. Ass'n, 59 Hun, 336; 36 N. Y. State Rep. 70.

⁸ Kennedy v. Wood, 52 Hun, 46; 22 N. Y. State Rep. 132.

⁹ Neal v. Foster, 34 Fed. Rep. 496.

¹⁰ Worthington v. Worthington (Md.), 20 Atl. Rep. 911.

(8) The rule that an assignor cannot after assignment invalidate the title of the assignee by declarations applies only in aid of *bona fide* assignees for value.¹

(9) The entire value of the class of hearsay evidence now under discussion depends upon its spontaneity, and is predicated upon the idea that, being spontaneous, springing from the act itself, and forming a part of it in point of time before any idea of deliberate design or purpose to make evidence for each other has entered the minds of the parties, it tends to explain, unfold and throw light upon the transaction.² It is for this reason and on this ground that the declarations of a party who has been injured and is suffering from the effects of the injury are admissible to show the extent of such suffering.³

(10) Whenever the bodily or mental feelings of a person are material, the usual expressions of such feelings made at the time in question are, as to such facts, original evidence. Therefore exclamations of pain and complaints of suffering resulting either from sickness or an injury to the person are treated as original evidence to prove the fact and extent of suffering;⁴ but not to prove the cause thereof, unless made at such time as to entitle them to be regarded as part of the *res gestæ*.⁵ Thus, expressions and complaints of a person injured, at the time of or very soon after the accident, as to his sufferings and strange feelings in certain portions of his body, are admissible in evidence when the injury was of a nature to produce the symptoms. It has been held that as the question as to whether they were real or feigned is for the jury, the lapse of time after the accident affected their weight but not their admissibility.⁶

¹ Koch v. Lyons, 83 Mich. 513.

² Com. v. Mullin, 150 Mass. 394; Keyes v. State, 122 Ind. 527; Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113; Rains v. State, 88 Ala. 91; People v. O'Neil, 112 N. Y. 355; 20 N. Y. State Rep. 754.

³ Burnham v. State, 38 Tex. 662; State v. Euzebe, 42 La. Ann. 17; Fulcher v. State, 28 Tex. App. 465.

⁴ Territory v. Godfrey, 6 Dak. 46; Tobin v. Fairport, 12 N. Y. Supp. 224; Blair v. Madison County, 81 Iowa,

313; Smith v. Dittman, 34 N. Y. State Rep. 303.

⁵ Stiles v. Danville, 42 Vt. 282; Perkins v. Concord, 44 N. H. 223; Materson v. New York Cent. R. R. Co., 35 N. Y. 487.

⁶ Texas & P. R. Co. v. Barron, 78 Tex. 421; Birmingham U. R. Co. v. Hale, 90 Ala. 8; Rhodes v. State, 128 Ind. 189; 25 Am. St. Rep. 429. But see Ryan v. Porter Mfg. Co., 57 Hun, 253; 32 N. Y. State Rep. 621.

(11) Declarations of the plaintiff in an action for personal injuries, of pain and suffering a few hours after the accident, to one not a physician in attendance professionally, are incompetent.¹

(12) Testimony of the physician who attended one injured by negligence, that when he first saw her she was complaining of pain from an injury she said she had received, is competent.² So are declarations and ejaculations indicative of pain and suffering made by a woman upon whom it is charged that an abortion has been performed.³

(13) On a prosecution for rape, the fact of the woman having made complaint soon after the commission of the offense, and that she named the person who committed it, is held to be competent.⁴ So in *Leonard v. Bolton*⁵ the complainant's accusation of the respondent during her travail, as the father of her child, was held competent. But the detailed statement of the prosecutrix of the circumstances of the offense cannot be given in evidence by the party to whom she made the statement.⁶ The same rule prevails in a charge of assault with intent to commit rape.⁷ This is on the ground that a declaration of a party as to a past transaction is not competent.⁸ Thus, a physician or other person cannot detail statements made to him, by a person alleged to have been injured, of a past transaction.⁹

(14) On the trial of a person for treason, the cry of the mob who accompanied the prisoner on his enterprise was received as part of the *res gestæ*.¹⁰

(15) On a prosecution for a murder, a statement made by the deceased, immediately after he was knocked down, as to how the accident happened, was allowed.

¹ *Kennedy v. Rochester C. & B. R. Co.*, 130 N. Y. 654; 41 N. Y. State Rep. 329. *W. Rep.* 1124; *Barnes v. State*, 88 Ala. 204; *McMurrin v. Rigley* (Iowa), 45 N. W. Rep. 877; *Kirby v. Territory* (Ariz.), 28 Pac. Rep. 1134.

² *Birmingham U. R. Co. v. Hale*, 90 Ala. 8.

³ *Rhodes v. State* (Ind.), 27 N. E. Rep. 866.

⁴ *Ellis v. State*, 25 Fla. 702; *Lee v. State*, 74 Wis. 45.

⁵ 148 Mass. 66.

⁶ *State v. Campbell*, 20 Nev. 123.

⁷ *People v. Goulette* (Mich.), 45 N.

⁸ *Kelly v. Detroit, L. & N. R. Co.*, 80 Mich. 237.

⁹ *Stewart v. Everts*, 76 Wis. 35; *Old v. Gardner*, 48 Hun, 169; 15 N. Y. State Rep. 544; *Laughlin v. Grand Rapids R. Co.* (Mich.), 44 N. W. Rep. 1049.

¹⁰ 21 How. St. Tr. 514.

(16) In an action for a divorce, E. testified to seeing the defendant sitting in R.'s lap. R.'s wife testified that she requested her husband to hold the defendant in his lap, she being ill at the time, while the bed was making. That she left the room for a moment while her husband was holding the defendant, and when she returned he told her that E. had been in. This was held competent as identifying the occasion as the same testified to by E.¹

(17) Where a person changes his domicile, or leaves his home, or returns there, or remains abroad; or, in fine, does any act material to be understood, his declarations made at the time of the transaction and expressive of its character, motive or object are regarded as verbal acts indicative of a present purpose and intention, and are competent evidence.²

(18) What was said and done at a meeting to organize a new corporation to acquire and carry on the business of a former company may be proved to show that there was an understanding among all the parties that the new organization should pay the debts of the old.³

(19) A person may explain the reason for jumping from a train.⁴

(20) In a suit for enticing away a wife or servant, the wife's or servant's statements at the time of leaving will be received as tending to show the motive.⁵

(21) Where the issue is as to whether certain property had been sold to defendant or a third person, the plaintiff may show that just before the sale he had been advised not to sell the property to such third person. He may prove this by the person who gave him the advice.⁶

(22) Where goods and chattels are levied upon as the property of A., which are claimed by B. by virtue of a sale from A. to him, it is competent, in a suit to test the validity of the sale, for B. to show, by one in whose possession the property is found, a conversation at the time of the alleged sale between A. and B. that the property had been sold to B.

¹ Earle v. Earle (Mass.), 11 Allen, 1.

⁴ St. John v. Missouri P. R. Co., 101

² Gorham v. Canton, 5 Me. 266; Mo. 417.

Ward v. Ward, 59 Conn. 188.

⁵ Hadley v. Carter, 8 N. H. 40.

³ Ft. Worth Pub. Co. v. Hetson, 80

⁶ Bronner v. Frauenthal, 37 N. Y.

Tex. 216-234.

166.

(23) Declarations made by a husband at the time of giving his wife money, as to the purpose for which he gave it, as well as his statements as to the person for whom he was acting when he received a bill of sale for his wife, are admissible in an action in favor of the wife.¹

(24) Whenever it becomes material to ascertain the nature of a particular act, and the intention of the person who did it, what he said and did at the time of doing it is always competent as part of the transaction.² Thus, the declarations or exclamations of passengers on a railroad train at the time of the happening of the accident; the declarations of bystanders at a public auction;³ the sayings of a constable at the time of making a levy;⁴ the declarations of a servant at the time of leaving his master;⁵ the declarations of a person, on leaving home, as to where he was going and the nature of his business,⁶ are competent.

(25) The relation between the principal fact and the declarations or facts sought to be established as a part of the *res gestæ* must be such that it may be said that the declarations or acts are the declarations and acts of the transaction itself.⁷

(26) The declarations of an agent are admissible as evidence against his principal, only when made while transacting the business of the principal, and as a part of the transaction which is the subject of inquiry in the suit in which they are offered. They are then admitted as "verbal acts," and a part of the *res gestæ*. What he may have said before the transaction is entered into, or after its completion, as explanatory, is no more admissible than if made by a stranger.⁸ To be admissible they must be in the nature of original and not hearsay evidence; they must constitute the fact to be proved, and must not be the mere admission of some other fact.

(27) The question as to whether such a space of time had elapsed between the act and declaration that the declaration could have been fairly said to have been detached is one

¹ Kells v. Campbell, 2 Abb. Ct. App. (N. Y.) 492; Trevis v. Hicks, 41 Cal. 123.

² Curtis v. Moore, 20 Md. 93.

³ Stewart v. Severance, 43 Mo. 322.

⁴ Dobb v. Justice; 17 Ga. 624.

⁵ Hadley v. Carter, 8 N. H. 40.

⁶ Autanqua Co. v. Davis, 32 Ala. 713.

⁷ People v. Greenfield, 85 N. Y. 75.

⁸ McDermott v. Hannibal & St. J. R. Co., 73 Mo. 516; 39 Am. Rep. 526.

which depends entirely upon the circumstances of each case. In *Cleveland, etc. R. Co. v. Mara*,¹ in an action for injuries to a person by being thrown into a ditch, evidence of what he said while being helped out was held not to be a part of the *res gestæ*, but an account of a past transaction. In *Jackson v. State*² fifteen minutes was held too long. The real test is whether the principal act and the declarations or acts are detached from each other by such a lapse of time as to make it possible for the parties to speak or act from deliberate design, rather than from instinctive impulse or the natural promptings of the mind.³

(28) Declarations and acts after the principal act is complete, or an injury is received, so far detached therefrom in point of time as to admit of deliberate design, or as to be fairly detached from the transaction to which they relate and in which there has been an opportunity for fabricating an explanation thereof, are no more a part of the *res gestæ*, although they occur within a few moments after the act, than is a declaration made a week afterwards.⁴ Nor can anything said or done before the principal act occurred, or which was within the contemplation of the parties, be regarded as a part of the *res gestæ*. But in *State v. Thomas*⁵ what a person said before the alleged larceny was held to be admissible on his part as a part of the *res gestæ*; and in *Davis v. Zimmerman*⁶ it was held that such declarations relating to the title of property were in some cases admissible as a part of the *res gestæ*, because they tend to explain the acts of the party relating thereto.

(29) When the principal act is once in contemplation of the parties, their acts and sayings relating thereto and which tend to explain or unfold the principal act, from that time until the act is complete, come under the head of *res gestæ*.⁷ In *Baker v. Caisin*,⁸ in an action for assault and battery, evidence of what the parties said during the altercation which was followed by the assault, and even the declarations of a by-stander made dur-

¹ 26 Ohio St. 185.

⁵ 30 La. Ann. 600.

² 52 Ala. 303.

⁶ 40 Mich. 20.

³ *State v. Garrand*, 5 Oreg. 216.

⁷ *Hunter v. State*, 40 N. J. L. 496;

⁴ *Sorenson v. Dundas*, 42 Wis. 462; *Cunningham v. Parks*, 97 Mass. 172.

Osborn v. Robbins, 37 Barb. 481;

⁸ 76 Ind. 316.

Luby v. Hudson River Co., 17 N. Y. 131.

ing the progress of such altercation, were held to be admissible. In *State v. Howard*¹ what a person said about going to a place, before he started, was held admissible. So in *Hunter v. State*² a letter from a man, afterwards murdered, to his wife, that the prisoner was with him, was held to be a part of the *res gestæ*. In short, the principle does not extend to the exclusion of any of what may be termed real or natural facts and circumstances in any way connected with the transaction, and from which any inference as to the truth of the disputed fact can be reasonable made.³

(30) As a general rule the *res gestæ* remains with the *locus in quo*, and does not follow the parties after the principal act is complete.⁴ Thus, if a party is injured by reason of a defect in a highway, declarations made by him at the place of the injury, immediately upon the happening of the accident, are a part of the *res gestæ*; but after the party has gone away from the *locus in quo*, however soon after the injury, his declarations cease to be a part of the *res gestæ*, so far as the cause of the accident is concerned.⁵ But in *Powers v. West Troy*,⁶ declarations as to the nature of the injury and its extent, made by the injured person, were admitted, where the injury resulted from being thrown from a sleigh in consequence of a defect in the highway, after he had gotten into the sleigh. But the distinction between these cases is, that in the one case the declarations related to the cause of the injury, while in the other they related to the nature of the person's injury, which with him was a present and continuing fact.⁷

(31) The following matters have been held to be a part of the *res gestæ*: Everything that takes place between the parties to a verbal contract before its completion;⁸ declarations of a public surveyor, when running a line, that he was running a division line;⁹ declarations of by-standers at a public sale;¹⁰ of a party in possession of property, made at the time

¹ 32 Vt. 380.

² 40 N. J. L. 495.

³ *State v. Cox*, 64 Ga. 374; 37 Am. Rep. 76; *Douglass v. Chapin*, 26 Conn. 76; *State v. Dickinson*, 41 Wis. 299.

⁴ *Prideaux v. Mineral Point*, 43 Wis. 513.

⁵ *Wood's Prac. Ev.*, § 469; *Prideaux v. Mineral Point*, 43 Wis. 513; *Mutcher v. Pierce*, 49 id. 231.

⁶ 25 Hun, 561.

⁷ *State v. Gedick*, 43 N. J. L. 86.

⁸ *Pierson v. Hoag*, 47 Barb. 243.

⁹ *George v. Thomas*, 16 Tex. 74.

¹⁰ *Stewart v. Severance*, 43 Mo. 322.

of the transfer to him, as to the nature of the possession;¹ of a party paying money, for the purpose of showing the application or appropriation of the money paid.²

(32) In actions for criminal conversation, if it is material, with the view of increasing or diminishing the damages, to ascertain upon what terms the husband and wife lived together before the seduction, their language and deportment towards each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence. But it must be proved by some evidence, independent of the date appearing on the face of the letters, that they were written by the wife to the husband prior to any suspicion of misconduct on her part.³

III. CONSPIRATORS — DECLARATIONS OF.

§ 14. *In general.*— It is a general rule that where several persons are proved to have combined together for the same illegal purpose, everything said, done or written by any one of the conspirators in the execution or furtherance of their common purpose is to be deemed as so said, done or written by every one.⁴ But *prima facie* evidence must first be given of the existence of the conspiracy; that is, common design must first be shown before the statements or declarations made by one of them, in the absence of the others, can be given in evidence against the others;⁵ that is to say, the general rule is that where sufficient proof of a conspiracy has been given to establish the fact *prima facie* in the opinion of the judge, the acts and declarations of each conspirator, in the furtherance of the common object, are competent evidence

¹ State v. Schnuder, 35 Mo. 533.

S. W. Rep. 309; Com. v. Smith, 153

² Bank of Woodstock v. Clark, 25 Vt. 308.

Mass. 97.

³ Edwards v. Cook, 3 East, 39; Trelawney v. Coleman, 1 B. & Ald. 90; Wilton v. Webster, 7 C. & P. 198; Trelawney v. Coleman, 2 Stark. 191.

⁵ Rutherford v. Schattman, 119

⁴ State v. Thaden (Minn.), 45 N. W. Rep. 447; Seville v. State (Ohio), 30 N. E. Rep. 621; Johnson v. State, 87 Ala. 39; Hatfield v. Com. (Ky.), 12

N. Y. 604; 28 N. Y. State Rep. 847; People v. Kief, 37 N. Y. State Rep. 477; 126 N. Y. 661; Johnson v. State, 87 Ala. 39; Moore v. Shields, 121 Ind. 267; State v. Brady, 107 N. C. 822; Barclay v. Copeland, 86 Cal. 492; Wicks v. State, 28 Tex. App. 448; Farrar v. Snyder, 31 Mo. App. 93; Hopkins v. Stuart, 39 Minn. 90.

against all. But to make the declaration competent it must have been made in furtherance of the prosecution of the common object, or constitute a part of the *res gestæ* of some act done for that purpose. A mere rehearsal of something already done for the accomplishment of the object of the conspirators is not competent evidence against the others.¹ The principle is substantially the same as that of principal and agent. When various persons conspire to commit an offense, each makes the rest his agents to carry the plan into execution.

§ 15. **Criminal conspiracy.**—The gist of the crime of conspiracy consists in a corrupt agreement between two or more individuals to do an unlawful act — unlawful either as a means or as an end. The agreement may be established by direct proof or by inference, as a deduction from conduct which discloses a common design on the part of the persons charged to act together for the accomplishment of the unlawful purpose. The formation of a common design by two or more persons is never *simpliciter* a criminal conspiracy. This may be, and often is, perfectly innocent. The criminal quality resides in the intention of the parties to the agreement, construed in connection with the purpose contemplated. The mere fact that the conspiracy has for its object the doing of an act which may be unlawful, followed by the doing of such act, does not constitute the crime of conspiracy, unless the jury find that the parties were actuated by a criminal intent. In many cases this inference would be irresistible; in others the jury might find that although the object of the agreement and the overt act were unlawful, nevertheless the parties charged acted under a misconception or in ignorance, without any actual criminal motive. The actual criminal or wrongful purpose must accompany the agreement, and if that is absent the crime of conspiracy has not been committed.² If the guilt of one of several persons who are charged with crime is sought to be established by evidence showing or tending to show a conspiracy between him and the others for the commission of the act, evidence as to acts or statements of the others must be confined to such as were made or done at

¹ *People v. Davis*, 56 N. Y. 95.

² *People v. Flack et al.*, 125 N. Y. 324; 34 N. Y. State Rep. 722.

times when the proofs in the case permit of a belief that a conspiracy existed, and when, therefore, the acts or statements might have been in furtherance of the common design. Whatever may have been said or done by the several persons accused of conspiring to commit the crime before the time when, according to the evidence, the conspiracy was formed, or subsequent to the time when the conspiracy terminated by the accomplishment of the common purpose, or by abandonment, is inadmissible.¹ Declarations and acts of other members of a conspiracy are inadmissible to show the connection with the conspiracy of one charged with being a member thereof.² Such acts and declarations are inadmissible if made after the common enterprise is at an end, or before the party against whom the acts and declarations are offered had become a party to it.³ But where a conspiracy is conclusively proved, evidence is admissible of the statements of one defendant as against another, if made while the conspiracy existed.⁴

§ 16. *Illustrations.*—(a) Declarations of co-conspirators at a time before the formation of the conspiracy are inadmissible against each other.⁵ So after the conspiracy has come to an end, whether by success or failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others.⁶ Thus, the existence of a conspiracy to procure an indictment and conviction on a criminal charge cannot be established by acts and declarations of one conspirator in the absence of the others after the trial and acquittal of the one conspired against, since the conspiracy ceased when the indictment and conviction failed.⁷

(b) When a conspiracy has been proved, sayings and movements of the co-conspirators before the perpetration of the principal act are admissible against the defendant, although occurring in his absence.⁸ So is evidence of what other con-

¹ *People v. Kief*, 126 N. Y. 661; 37 N. Y. State Rep. 477.

⁵ *Baker v. State*, 80 Wis. 416.

⁶ *Logan v. United States*, 144 U. S.

² *United States v. Newton*, 52 Fed. Rep. 275.

⁷ *Roberts v. Kendall*, 3 Ind. App.

³ *State v. Grant* (Iowa), 53 N. W. Rep. 120.

339.

⁴ *State v. Minton* (Mo.), 22 S. W. Rep. 808; *Com. v. Moore*, 157 Mass. 324.

⁸ *Travers v. Snyder*, 38 Ill. App. 379; *Williams v. Dickerson*, 28 Fla. 90; *Clark v. State*, 28 Tex. App. 189.

spirators had planned before the defendant had joined them, where he subsequently acted with them, and the same purpose was expressed and executed while he was with them.¹ And conversations explanatory of acts of different persons tending to show the details of a conspiracy which resulted in murder may be shown, although made before the conspiracy and not in the presence of defendant.² So where there is evidence tending to show a conspiracy to burn a house for the purpose of obtaining insurance, evidence of acts and declarations of some of the conspirators, after the fire, in regard to the disposition of the property, is admissible as against all, as being in furtherance of the common design.³ And while proof of what was actually done is admissible to show a conspiracy,⁴ declarations of co-conspirators, in order to be evidence, must be made in furtherance of the conspiracy and not in casual conversation with neighbors.⁵

(c) Where words or writings of alleged conspirators are not acts in themselves, nor part of the *res gestæ*, but a mere narrative of some part of the transaction, nor as to the share which other persons have had in the execution of a common design, they are not admissible against others than the speaker. Thus, a confession by an alleged confederate, just before he was hanged by a mob, is inadmissible.⁶ So are the declarations of a co-defendant subsequent to the completion of the joint criminal enterprise, as against his co-defendant.⁷ So evidence of statements made before the commission of the crime by one jointly indicted with defendant, but who is not on trial, is inadmissible where no conspiracy has been shown.⁸ In *Taylor County v. Standley*,⁹ it was held that only such statements of a co-conspirator as were made while the conspir-

¹ *Holtz v. State*, 76 Wis. 99.

⁴ *Com. v. Meserve*, 154 Mass. 284.

² *State v. Munchrath*, 78 Iowa, 268;

⁵ *State v. McGee*, 81 Iowa, 17.

Allen v. Com., 11 Ky. L. Rep. 555;

⁶ *Mitchell v. Com. (Ky.)*, 14 S. W. Rep. 489.

McFadden v. State, 28 Tex. App. 241;

⁷ *State v. Hilderbrand*, 105 Mo. 318; *Crosby v. People*, 137 Ill. 325.

Cooley v. Com. (Ky.), 12 S. W. Rep. 132.

⁸ *Belcher v. State*, 125 Ind. 419; *Walls v. State*, id. 400.

³ *Com. v. Smith*, 153 Mass. 97. And see *Cole v. Lake Shore & M. S. R. Co.*, 81 Mich. 156; *State v. Thaden (Minn.)*, 45 N. W. Rep. 447; *Chesbro v. Powers*, 78 Mich. 472.

⁹ 79 Iowa, 666.

acy was in progress, and in furtherance thereof, are admissible in evidence against a defendant; and letters of a private nature, written to others than a conspirator, are not admissible except as against the writer.

§ 17. **Declarations as to ownership.**—Declarations as to the ownership of property, made by a person in possession thereof, are admissible as against him and all persons claiming under him, upon an issue as to such ownership, as part of the *res gestæ*;¹ and declarations by one in possession of land, as to his title, are admissible upon an issue as to such ownership;² and the intention with which possession of land is held may be shown by the assertion of the occupant;³ and the declarations of a party in possession of land, that one who claims title under an old sheriff's deed is the owner, are admissible;⁴ so are the declarations of a party that he bid in the property for another.⁵ The admissibility of declarations of the vendor of goods characterizing his possession, while he is in full possession of the goods, is not confined to uses where fraud in the transfer is alleged. But the acts and declarations of one in possession of land as tenant are inadmissible to show either title or want of title in the landlord.⁶

§ 18. **Acts and declarations as to fraud and fraudulent conveyances.**—The general rule that declarations of a party, made after he has parted with his interest in the subject-matter, cannot be received to disparage the right or title of one who acquired the same before such declarations, does not apply to transfers of property made for the purpose of defrauding creditors.⁷ At least for the purpose of showing the assignor's intent, his acts and declarations are admissible to show a conspiracy between himself and his assignee to so manipulate the property as that it shall be lost to the real creditors.⁸ To impeach the validity of a conveyance on the ground

¹ Lawman v. Sheets, 124 Ind. 416; Cunningham v. Fuller, 35 Neb. 58.

² Rutledge v. Hudson, 80 Ga. 266.

³ Youngs v. Cunningham, 57 Mich. 153; Jacobs v. Callaghan, id. 11; Johnson v. Johnson, 80 Ga. 260; Smith v. Putnam, 62 N. H. 369.

⁴ Hasbrouck v. Burhans, 47 Hun, 487; 14 N. Y. State Rep. 355.

⁵ Schmidt v. Huff (Tex.), 19 S. W. Rep. 131; Guest v. Guest, 74 Tex. 664.

⁶ Warren v. Fredericks, 76 Tex. 647; Hendricks v. McDaniel, 80 Ga. 102.

⁷ Smith v. Boyer (Neb.), 45 N. W. Rep. 265.

⁸ Pease v. Batten, 56 Hun, 643; 31 N. Y. State Rep. 57.

of fraud, declarations of a vendor or vendee tending to reveal the character of the transaction are admissible, when made at or prior to the time of sale and after ground has been laid for the claim of fraudulent collusion.¹ Thus, declarations of a grantor who has retained possession of the land conveyed after the execution of the conveyance, made during his possession and explanatory thereof, are admissible.² So are the acts and declarations of the insured before the transfer of a policy of insurance on his life, which tend to show a fraud on the insurance company, it being a part of the *res gestæ*.³ So are the statements of a decedent made in furtherance of an alleged fraudulent agreement to suffer judgment on a fictitious claim.⁴ So, where an assignment of notes belonging to an insolvent debtor was a part of a transaction by which his whole property was distributed to certain of his creditors in fraud of the others, whatever was said or done by any of the parties in the transaction, or by one of the assignees in furtherance of the transaction, is a part of the *res gestæ* and is evidence against all such parties.⁵ So evidence of a fraudulent intent in a vendor is admissible with a view to show a participation therein by the vendee.⁶ But evidence of a conversation between a deputy-sheriff who levies an attachment upon goods and the vendor thereof, against whom the levy is made, is incompetent to affect the vendee's title, unless contemporaneous with the sale, or the evidence shows that the sale is a joint scheme to defraud creditors.⁷ Where a sale of goods has been induced by fraudulent representations of the vendee, evidence of the representations is admissible in an action against the sheriff, who has levied upon them as the property of the vendee.⁸ But to render the declarations of a grantor who has remained in possession after the grant admissible against his grantee to prove fraud, it must distinctly

¹ Grimes v. Hill, 15 Colo. 359; Palmer v. Gilmore, 148 Pa. St. 48.

² Mobile Sav. Bank v. McDonnell, 89 Ala. 434; 18 Am. St. Rep. 137.

³ Smith v. Nat. Ben. Soc., 123 N. Y. 85; 33 N. Y. State Rep. 67.

⁴ Spaulding v. Albin, 63 Vt. 148.

⁵ Klei v. Hoffheimer, 132 U. S. 367.

⁶ Crosland v. Mutual Sav. Fund, 121 Pa. St. 65; Deserberber v. Harrington, 28 Mo. App. 632; Robinson v. Woodmansee, 80 Ga. 549.

⁷ Flannery v. Van Tassell, 131 N. Y. 649; 43 N. Y. State Rep. 324.

⁸ Lewis v. Flack, 31 N. Y. State Rep. 282.

appear that the declarant was an occupant at the time.¹ And where a conveyance of personalty is attacked by creditors as fraudulent, the declarations of the seller, made after the conveyance, are not admissible as against the purchaser's title, in the absence of proof of identity of interest and design between the parties.² Thus, where there is no evidence showing a conspiracy between the mortgagor and mortgagee to defraud creditors of the former, his declarations after he executed it, impeaching the mortgage, made in the absence of the mortgagee, are mere hearsay and inadmissible;³ and declarations of a debtor to third persons as to his intention in confessing judgment to one of his creditors are not admissible in evidence to defeat the judgment as against such creditors, without previous proof that the latter was a party to the debtor's fraudulent intention.⁴

§ 19. Acts and declarations of or in presence of donor, testator or intestate.—Declarations of a person since deceased, or of a testator or intestate, are admissible in some cases. Thus, on the question of a gift of personal property, declarations and acts of the donor, before or about the time of acceptance, declaring her purpose, are admissible to show intention and the character of the acts performed in relation to the alleged gift, and also as against interest;⁵ and also to show delivery.⁶ Thus, a declaration of a decedent that he has promised his housekeeper that she should be paid for waiting on him is competent in evidence against his executors.⁷ The *ex parte* declarations of a decedent as to his intended disposition of notes, a cancellation of which is alleged to have been procured by the maker by undue influence, is admissible in evidence on behalf of the payee's legal representative suing on the note.⁸ And where there has been plenary proof of an

¹ *Noyes v. Morris*, 56 Hun, 501; 31 N. Y. State Rep. 608.

² *Bergan v. Producers' Marble Co.*, 72 Tex. 53; *Lewis v. Rice*, 61 Mich. 97.

³ *McLemore v. Powell*, 32 S. C. 582; *Fink v. Algermissen*, 25 Mo. App. 186; *Com. v. Cremeans*, 13 S. W. Rep. 834; *Freiberg v. Freiberg*, 74 Tex. 122; *Kintzel v. Kintzel*, 133 Pa. St. 71.

⁴ *Unanast v. Goodyear India Rub-*

ber Glove Co., 141 Pa. St. 127; *Guebert v. Zick*, 31 Ill. App. 390.

⁵ *Miller v. Clark*, 40 Fed. Rep. 15.

⁶ *Porter v. Gardner*, 39 N. Y. State Rep. 671; *People v. Doyle*, 58 Hun, 535.

⁷ *Harrington v. Hickman*, 148 Pa. St. 401; *Re Starkie's Appeal*, 61 Conn. 199.

⁸ *Smith v. Loafman*, 145 Pa. St. 628.

alleged parol gift by a deceased person, subsequent declarations of the donor, inconsistent with the gift, is inadmissible.¹ Where a devise is, on the face of it, clear and intelligible, but from external circumstances an ambiguity arises as to which of two or more things or persons the testator referred to, it being legally certain that he intended one or the other, evidence of his declarations, of the instructions given for his will, and of other circumstances of like nature, is admissible to determine his intention.² So the declarations of a testator as to his testamentary intention are admissible when probate is resisted on the ground of fraud, undue influence or surprise;³ at least to show the state of his mind previous to the execution of the will;⁴ and on the question of his testamentary capacity;⁵ and that the testator intended to make some changes as he did make in the codicil.⁶ So the acts and declarations of the parties participating in the execution of a will are admissible as part of the *res gestæ*.⁷ And declarations made by a testator before his death, that he intended to destroy a will previously made by him, are competent to strengthen the presumption that the will, which is not found after his death, was destroyed with the intention of revoking it.⁸

§ 20. **Telephone conversation.**—While it is held in *Wilson v. Coleman*⁹ that testimony as to questions asked by the witness' clerk through a telephone, of a third party, and the clerk's statements to the witness of the replies of such party to the questions, was inadmissible as hearsay, it does not seem to conflict with the case of *Globe Printing Co. v. Stahl*,¹⁰ in which it is held that evidence of an answer purporting to come from the defendant, received over a wire connecting the defendant's telephone with that of the plaintiff, in response to an inquiry made through the same medium by the plaintiff, is admissible without positive proof that the defendant sent the answer. But in *J. Obermann Brew. Co. v. Adams*¹¹

¹ *Bennett v. Cook*, 28 S. C. 353.

² *Coulam v. Doull*, 133 U. S. 216.

³ *Gardner v. Frieze*, 16 R. I. 19.

⁴ *Thompson v. Ish*, 99 Mo. 161.

⁵ *Jones v. Roberts*, 37 Mo. App. 163.

⁶ *Hammond v. Dike*, 42 Minn. 273;

Maxwell v. Hill, 89 Tenn. 584.

⁷ *Chaney v. Home F. & F. M. Soc.*, 28 Ill. App. 21.

⁸ *Behrens v. Behrens*, 47 Ohio St. 323; 42 Alb. L. J. 436.

⁹ 81 Ga. 297.

¹⁰ 23 Mo. App. 451.

¹¹ 35 Ill. App. 540.

the court say: "Evidence of a conversation by telephone between plaintiff and a person supposed to be at defendant's office is inadmissible against the defendant, where there is no proof as to who the said person was." In the case of *Rock Island & P. R. Co. v. Potter*¹ it was held that an answer in response to a telephone inquiry by plaintiff may be proved against defendant as being *prima facie* an answer by its agent. In *Oskamp v. Gadsden*² the court say: "A telephone conversation between parties to a suit may be admissible in evidence, although, owing to the conditions of the atmosphere, the parties were unable to communicate directly with each other, but did so through the medium of an operator at an intermediate station, who received the communication from each of them and transmitted it to the other." And in *Missouri P. R. Co. v. Heidenheimer*³ the court say: "Evidence of a demand made by telephone upon a railroad company for the delivery of goods is not inadmissible because the witness cannot state the name of the person with whom he conversed, when he states that he recognized the voice as that of an employee of the railroad freight office, with whom he had transacted business for that office."

The admissions, declarations and statements of a party conveyed through the medium of a telephone are competent evidence, if it appears that the party testifying to such statements knew in some satisfactory way that the party whose statements he is testifying to was speaking with him; that is to say, if the party was acquainted with such party and recognized his voice, or if it appear in some satisfactory way that such person was speaking with him. The perfection to which the invention of the telephone has been brought has immensely facilitated the intercommunication of individuals at distant points; and inasmuch as the voice of the speaker is heard in most if not in all cases, the identification of the speaker should be possible.⁴

¹ 36 Ill. App. 590.

² 35 Neb. 7; 17 L. R. A. 440.

³ 82 Tex. 195.

⁴ *Murphy v. Jack et al.*, 58 N. Y. State Rep. 458 (1890).

CHAPTER XV.

OPINIONS AND CONCLUSIONS.

<p>I. OF OPINIONS AND CONCLUSIONS.</p> <p>§ 1. In general.</p> <p>2. General rule.</p> <p>3. Illustrations.</p> <p>4. When opinions allowable.</p> <p>5. Opinions not allowable when.</p> <p>II. FORM OF QUESTIONS AND ANSWERS.</p> <p>III. WHAT WITNESSES MAY STATE OPINIONS.</p> <p>IV. OPINIONS AS TO QUANTITY, DISTANCE, SPEED, TIME.</p> <p>V. CARE, SKILL, NEGLIGENCE — PROPER CAUSE OF ACTION.</p>	<p>VI. SANITY AND MENTAL CAPACITY.</p> <p>VII. MOTIVES, INTENT, THOUGHTS, BELIEF.</p> <p>VIII. OPINIONS AS TO LEGAL QUESTIONS.</p> <p>IX. PHYSICAL CONDITIONS.</p> <p>X. HANDWRITING.</p> <p>XI. APPEARANCE, IDENTITY, AGE, QUALITY.</p> <p>XII. LOCATION, LANGUAGE.</p> <p>XIII. MISCELLANEOUS.</p> <p>XIV. OPINIONS OF NON-EXPERTS.</p>
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I. OF OPINIONS AND CONCLUSIONS.

§ 1. **In general.**— As a general rule, opinions are competent only when the witness is shown to have special knowledge of the subject of inquiry;¹ and expert evidence is inadmissible as to a subject which does not require peculiar habits of study to enable a person to understand it;² and the opinion of a witness who neither knows nor can know more about the subject-matter than the jury, and who must draw his deductions from the facts already in the possession of the jury, is inadmissible.³

While we recognize fully the difficulty of laying down a rule as to when expert evidence is admissible and when it is not, it is a general rule that witnesses who are skilled in science and art, and those who from experience and special study have peculiar knowledge upon the subject of inquiry

¹ Laing v. United N. J. R. & C. Co.,
54 N. J. L. 576.

³ St. Louis, I. M. & S. R. Co. v. Yarrow, 56 Ark. 612.

² Overby v. Chesapeake & O. R. Co.,
37 W. Va. 524.

which jurors have not, may testify not only to facts but may also give their opinions as experts. No rule, however, can be made so precise as to include all cases; and each question as it arises must be determined by the application of general principles to the peculiar inquiry involved in the case before the court. While it is no longer a valid objection to the expression of an opinion by a witness that it is upon the precise questions which the jury are to determine,¹ evidence of that character is only allowed when from the nature of the case the facts cannot be stated or described to the jury in such manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable.² Familiar examples of the admission of evidence of this character are cases involving questions of medical practice and skill, and cases involving genuineness of handwriting. Within the same principle, the question whether a vessel was unseaworthy was held admissible because it involved the result of an examination which could not be fully communicated to a jury.³ It was also held competent to ask a pilot "whether it would be safe for a tug-boat on Chesapeake Bay or any other wide water to tug three boats abreast with a high wind;"⁴ to ask of an engineer familiar with the locality and structure whether an embankment and bridges were skilfully constructed with reference to the creek;⁵ and evidence of like character has been admitted on the question of negligence in mooring a vessel,⁶ on the necessity of jettison,⁷ and on questions involving nautical skill.⁸ Opinions were held admissible in the cases cited for the reason that the controlling issue in the case involved questions of skill and experience which the witness' practical knowledge enabled him to speak upon, and because the facts which impressed the mind of the witness could not be placed before the jury, and no better evidence

¹ *Transportation Line v. Hope*, 95 U. S. 291; *Bellinger v. N. Y. C. R. Co.*, 23 N. Y. 42; *Cornish v. Insurance Co.*, 74 id. 296.

² *Ferguson v. Hubbell*, 97 N. Y. 507; *Schwander v. Birge*, 46 Hun, 66; 10 N. Y. State Rep. 802; 1 Greenl. Ev., § 440.

³ *Baird v. Daly*, 68 N. Y. 547.

⁴ *Transportation Line v. Hope*, 95 U. S. 297.

⁵ *Bellinger v. N. Y. C. R. Co.*, 23 N. Y. 42.

⁶ *Moore v. Westervelt*, 9 Bosw. (N. Y.) 558.

⁷ *Price v. Hartshorn*, 44 N. Y. 94.

⁸ *Walsh v. Marine Ins. Co.*, 32 N. Y. 427.

was available. The governing rule deduced from the cases permitting the opinion of witnesses is that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which exists in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject so as to possess them with a full understanding of it. That is to say, opinions are allowed when the facts cannot be adequately placed before the jury so as to impress their minds as they impress the mind of a competent and skilled observer. When the facts can be placed before a jury, and they are of such a nature that juries generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, there is no occasion to resort to expert or opinion evidence. To require the exclusion of such evidence it is not necessary that the jurors should be able to see the facts as they appear to eye-witnesses, or to be as capable to draw conclusions from them as some witnesses might be, but it is sufficient that the facts can be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them, can base intelligent judgments upon them, and comprehend them sufficiently for the ordinary administration of justice.

§ 2. **General rule.**—The opinions of witnesses derived from personal observation are admissible in evidence when, from the nature of the subject under investigation, it cannot be stated or described in such language as will enable persons not eye-witnesses to form any accurate judgment in regard to it, and no better evidence than such opinions can be obtained.¹ Sir J. Stephen, in his Digest of the Law of Evidence,² states the rule as follows: "The fact that any person is of opinion that a fact in issue, or relevant or deemed to be relevant to the issue, does or does not exist, is deemed to be irrelevant to the existence of such fact."³ When there is a question as to

¹ Hardy v. Merrill, 56 N. H. 227, 241; De Witt v. Barley, 17 N. Y. 340; Sydleman v. Beckwith, 43 Conn. 9; Com. v. Sturdevant, 117 Mass. 122: 1 Whart. Ev., §§ 508-513; 1 Redf. Wills, §§ 136, 141.

² Arts. 48, 49, 50, 54.

³ People v. Eastwood, 14 N. Y. 562; McKee v. Nelson, 4 Cow. 355; Insurance Co. v. Rodel, 95 U. S. 232-239; Clary v. Clary, 2 Ired. 78; Hardy v. Merrill, 56 N. H. 227; Brooks v. Town-

any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts.¹ Such persons are hereinafter called experts. The words 'science or art' include all subjects on which a course of special study or experience is necessary to the formation of an opinion,² and amongst others the examination of handwriting.³ When the question is as to a foreign law (authenticated copies of the written law), the opinions of experts who in their profession are acquainted with such law are the only admissible evidence thereof, though such experts may produce to the court books which they declare to be works of authority upon the foreign law in question, which books the court, having received all necessary explanations from the expert, may construe for itself.⁴ It is the duty of the judge to decide, subject to the opinion of the court above, whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert.⁵ The opinion of an expert as to the existence of the facts on which his opinion is to be given is irrelevant, unless he perceived them himself.⁶ Facts not otherwise relevant are deemed to be relevant if they support or are inconsistent with the opinions of experts, when such opinions are deemed to be relevant.⁷ Whenever the opinion of

send, 7 Gill, 27; *Wheeler v. Alderson*, 3 Hagg. Eccl. R. 574, 604, 605; *Tatham v. Wright*, 2 Russ. & Mylne, 1, 19; *Wright v. Doe d. Tatham*, 7 A. & E. 313; *Waters v. Waters*, 35 Md. 513, 543; *Higgins et al. v. Carlton & Scaggs*, 28 Md. 115, 137.

¹ *Milwaukee, etc. Ry. Co. v. Kellogg*, 94 U. S. 469, 472; *Page v. Parker*, 40 N. H. 47, 58; *Pelamourges v. Clarke*, 9 Iowa, 1, 12.

² 1 S. L. C. 555 (7th ed., note to *Carter v. Boehm*); 28 Vict., ch. 18, § 18.

³ *Withee v. Rowe*, 45 Me. 571, 589; *Davis' Appeal*, 38 Md. 15, 37.

⁴ *Baron de Bode's Case*, 8 Q. B. 250-267; *Di Sora v. Phillips*, 10 H. L. 624; *Castrique v. Imrie*, L. R. 4 E. & I. App. 424. See *Picton's Case*, 20 S. T.

510, 511; *Church v. Hubbard*, 2 Cranch, 187, 237; *Ennis v. Smith*, 14 How. (U. S.) 400; 426; *Charlotte v. Chouteau*, 33 Mo. 194, 200; *Barrows v. Downs*, 9 R. I. 447; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506, 520; *Jones v. Maffit*, 5 S. & R. 523, 531; *People v. Calder*, 30 Mich. 87.

⁵ *Briston v. Sequeville*, 6 Ex. 275; *Rowley v. L. & N. W. Ry.*, L. R. 8 Ex. 221; *In the Goods of Bonelli*, L. R. 1 P. D. 69; *Tucker v. Mass. Cent. R. R.*, 118 Mass. 547; *Delaware & Chesapeake Steam Towboat Co. v. Starre*, 69 Pa. St. 41.

⁶ 1 Ph. 507; *T. E.*, § 1278; *Walker v. Rogers, Ex'r*, 24 Md. 239, 242; *Spear v. Richardson*, 37 N. H. 23, 34.

⁷ *City of Ripon v. Bittel*, 30 Wis. 614, 619.

any living person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant."

§ 3. Illustrations.— (a) An expert witness might very well be asked, in the presence of a given effect, of what causes it either was or might be the resultant, if it assumes a hypothesis the truth or falsity of which is left open to the jury. In *Wycklyn v. The City of Rochester*¹ it was held incompetent to ask an expert witness "Was it possible for you to take in those pipes any water out of Spring creek?" And the court say: "If the question had called for a statement by the witness of any adequate cause within his knowledge for the disappearance of the creek, it would have been admissible. The jury would then have had before it a hypothesis or theory the truth or falsity of which they could have considered in connection with the open, visible facts of the case, and which would have been left open for their determination."

(b) A life insurance agent who is an expert with mortuary tables may testify to the expectation of life of a person killed, and that a person forty-six years of age would probably live twenty-three years.²

(c) An expert may give his opinion that if an engine had been equipped with a properly constructed spark-arrester it could not have emitted sparks of the size which were in fact thrown out.³ So experts may state, with the reasons therefor, whether it would be possible for a certain embankment to back water over a certain plantation situated four miles therefrom.⁴

(d) In *Hunter v. Manhattan R. Co.*,⁵ in an action to restrain an elevated railroad and for damages, the plaintiff was allowed to ask an expert the following questions: "In your opinion was there anything in the condition of Beaver and Water streets which should induce an upward rise in values greater than would have existed in Pearl street had there been no elevated railroad? Would the existence of such a structure and the

¹ 118 N. Y. 427; 29 N. Y. State Rep. 790.

² *International & G. N. R. Co. v. Kuehn* (Tex.), 21 S. W. Rep. 68; *Galveston, H. & S. A. R. Co. v. Cooper*, 85 Tex. 431.

³ *Frace v. New York, L. E. & W. R. Co.*, 68 Hun, 325; 52 N. Y. State Rep. 102.

⁴ *St. Louis, I. M. & S. R. Co. v. Lyman*, 57 Ark. 16.

⁵ 57 N. Y. State Rep. 400.

running of trains as described affect the rental value of the property in front of which it was constructed? Would it affect it favorably or unfavorably, in your judgment?" In that case the court say: "Evidence is admissible to show the general effects caused by the maintenance and operation of the elevated road upon abutting and neighboring properties. It is inadmissible to show what is the particular damage caused to the plaintiff's premises by the presence of the road, or to show what they would be worth, or what their rental value would be without the road. Questions of this latter class have been held to be an invasion of the province of the court or the jury; and the rule excludes questions calling for the judgment of the witness upon the question which is to be submitted and decided. But questions of the former class are permitted, for the reason that the general effects upon other properties and the existence and nature of a general injury being shown to the court or to the jury, they will be better enabled to infer the amount of the damage suffered in the particular case before them." Thus, while it seems that opinions of experts as to what premises abutting on an elevated railroad would have been worth if they were unaffected by the road and its operation are incompetent,¹ in such cases, when expert evidence is offered where it is not competent, the objection should be made that the question is "not within the competency of the witness and is not within the competency of any witness," or that "the question is not within the competency of this expert, or any expert," or that it is hypothetical, speculative and incompetent.

(e) Expert testimony is admissible to show the laws of alluvial streams, the cause and manner of growth of deposits of sediment, and their effect upon a stream the channel of which has been obstructed.² So an expert may state that in warm weather the testicles of a stallion will hang lower than in cold weather.³

(f) Mere opinions of witnesses are in general inadmissible.⁴ But opinion evidence, so far as it consists of a statement of an

¹ *Jefferson v. New York El. R. Co.*, 132 N. Y. 483; 44 N. Y. State Rep. 629.

² *Ohio & M. R. Co. v. Nuetzel*, 143 Ill. 46.

³ *Dunham v. Rix* (Iowa), 53 N. W. Rep. 252.

⁴ *Taylor v. Baltimore & O. R. Co.*, 33 W. Va. 39; *Taylor v. Penquite*, 35 Mo. App. 389.

effect produced upon the mind, becomes primary evidence, and admissible, whenever a condition of things is such that it cannot be produced and made palpable to the jury.¹ Evidence of medical experts is admissible as to their judgment that an injury was the cause of the condition of plaintiff, and that certain consequences would follow as the result of the injury as indicated by such condition.² And expert evidence is competent as to whether personal injuries from negligence could be produced by a fall, and whether they are permanent;³ or what might have caused a wound, or whether the injuries might have been caused by a fall.⁴ And a qualified physician may be asked his opinion on the basis of his examination of the body of the deceased as to the cause of his death,⁵ but not as to facts which he neither knew nor pretended to know.⁶

(g) The driver of a team may testify as to what frightened them.⁷

(h) When a witness has been in a position to know the facts, but his memory has grown dim, what he thinks he recollects is, if relevant, admissible.⁸

(i) The statement by a witness of a fact ascertained by him through the sense of hearing is not the statement of a mere matter of opinion, but of a conclusion reached from an operation of such physical sense.⁹

(j) A non-expert witness may give his opinion upon the question as to the cause of the overflow of a river, where he has apparently fully stated all the facts upon which his opinion is founded.¹⁰

(k) Witnesses may testify that they could have heard the bell or whistle if rung or sounded by a train.¹¹ So a witness may testify from mortality tables as to how many years de-

¹ *Graham v. State*, 28 Tex. App. 582; *Garner v. State*, 28 id. 561.

² *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459.

³ *Montgomery v. Long Island R. Co.*, 55 Hun, 611; 29 N. Y. State Rep. 822.

⁴ *Smalley v. Appleton*, 75 Wis. 18.

⁵ *People v. Hare*, 57 Mich. 505.

⁶ *Patterson v. South & N. A. R. Co. (Ala.)*, 7 S. Rep. 437.

⁷ *Geveke v. Grand Rapids & I. R. Co.*, 57 Mich. 589.

⁸ *Harris v. Nations*, 79 Tex. 409.

⁹ *Ogden v. People*, 134 Ill. 599.

¹⁰ *Gulf Coast & San Francisco R. Co. v. Locker*, 78 Tex. 279.

¹¹ *Chicago & A. R. Co. v. Dillon*, 24 Ill. App. 203; 123 Ill. 570; *Illinois Cent. R. Co. v. Slater*, 139 Ill. 190.

ceased would probably have lived;¹ or as to the liability of a railroad track to get out of line during a rain.²

(l) An opinion can be given by a non-expert concerning matters with which he is specially acquainted, but which cannot be described;³ but impressions of witnesses cannot be received and treated as evidence.⁴

(m) The governing rule is that the subject must be one of science or skill, or one of which observation and experience have given opportunity and means of knowledge which exists in reasons rather than descriptive facts, and therefore cannot be intelligently communicated by others not familiar with the subject so as to possess them with a full understanding of it.⁵ And inferences and facts are to be drawn and found by the jury, and cannot be proved as facts by the opinions of witnesses.⁶ And when the inquiry is about a matter that may be understood by one man of sense as well as another, and where no special course of study or training is required to understand it, opinions of experts are rejected.⁷

(n) The purpose of expert evidence is to aid the jury in their deliberation on the case, and in their review of the evidence, and to be competent for that purpose it must, where the questions involved are not open ones of science or art, be based upon evidence in the case, and confined to the causes of the injury complained of.⁸

§ 5. When allowable.—(1) An expert witness may state whether the string-pieces of a bridge were sound and suitable for the bridge;⁹ and as to the depreciation of the rental of real property in an action against a railroad company for

¹ San Antonio & A. P. R. Co. v. Bennett, 76 Tex. 151. 59 id. 618; McLean v. Schuyler Steam Towboat Line, 52 Hun, 43; 22 N. Y. State Rep. 213.

² Fort Worth & D. C. R. Co. v. Thomson, 75 Tex. 501.

³ East Tennessee, V. & G. R. Co. v. Watson (Ala.), 7 S. Rep. 813.

⁴ N. O. Nelson Mfg. Co. v. Mitchell, 38 Mo. App. 321.

⁵ Schwansen v. Birge, 46 Hun. 66.

⁶ People v. Barber, 115 N. Y. 475; 26 N. Y. State Rep. 184; Parrott v. Swain, 29 Ill. App. 266; Ireland v. Cincinnati, W. & M. R. Co., 79 Mich. 163; Limon v. Chicago & G. T. Co.,

⁷ Shelly v. Austin, 74 Tex. 608; Mann v. State, 23 Fla. 610; Marshall v. Bingle, 36 Mo. App. 122; Bailey v. Rome, Watertown & Ogdensburg R. Co., 55 Hun, 509; 26 N. Y. State Rep. 755.

⁸ Van Wycklen v. Brooklyn, 118 N. Y. 424; 41 Alb. L. J. 178; 29 N. Y. State Rep. 790.

⁹ Amadon v. Ingersoll, 34 Hun, 132.

damages for obstruction to light and air;¹ and as to the difference in value of the use of a farm with and without a crossing, in an action to recover damages for being deprived of the use of a farm crossing while defendant was building a bridge.²

(2) It is proper to ask an expert whether in his judgment an accident on a railroad was caused by a failure of the lever of the engine to work to shut off the steam;³ or the question to an expert engineer as to what adequate causes there were for the scouring of water upon a river bank;⁴ and as to the prospective profits, where the contract depends upon uncertain future events and there is no other way of proving the damage sustained.⁵

(3) The understanding of a witness is admissible.⁶

(4) A lay witness who is examined as to facts within his own knowledge and observation tending to show the soundness or unsoundness of a person's mind may characterize as rational or irrational the acts and declarations to which he testifies.⁷

(5) An expert, in answer to a hypothetical question as to how an injury occurred to a barge which ran upon a rock while in tow of defendant's steamer, may state whether it was before or after the breaking of a line.⁸ And a physician may state what must be, in the ordinary course, of nature, the effect of injuries described upon the health of a person.⁹

(6) A lay witness may give his opinion, based upon personal knowledge, of the facts of the position of a person's elbow upon the window-sill of a car-window, that it could not have been outside of the car, or, "I should judge that it could not have projected out of the window by the position that he held it in the car."¹⁰

¹ *Glover v. Manhattan Ry. Co.*, 51 N. Y. Supr. Ct. 1.

² *Vanderbergh v. Boston & Albany R. Co.* (N. Y.), 21 N. Y. Weekly Dig. 474.

³ *Murphy v. New York, Lake Erie & Western R. Co.*, 19 N. Y. Weekly Dig. 414; 98 N. Y. 635.

⁴ *Moyer v. New York Central & Hudson River R. Co.*, 98 N. Y. 645.

⁵ *Taylor v. Bradley*, 39 N. Y. 144; *Reed v. McConnell*, 17 N. Y. Weekly Dig. 578.

⁶ *Mather v. Parsons*, 32 Hun, 338; *Gulerette v. McKinley*, 27 id. 332; *Nicholay v. Unger*, 80 N. Y. 54.

⁷ *Holcomb v. Holcomb*, 95 N. Y. 316; *Rider v. Miller*, 86 id. 507; *Matter of Ross*, 87 id. 514.

⁸ *Salisbury v. Schuyler Steam T. B. Line*, 22 N. Y. Weekly Dig. 185.

⁹ *Jones v. Utica & Black River R. Co.*, 40 Hun, 349.

¹⁰ *Hallaban v. New York, Lake Erie & Western R. Co.*, 102 N. Y. 194.

(7) It is proper to give opinions of witnesses as to the value of an agreement, the profits which it or an agency established in pursuit of it could produce, the damages realized from a breach of such contract by one of the parties thereto, and the amount of business which could have been done under such an agreement, on the question of damages.¹

(8) In an action for personal injuries the plaintiff may show by expert testimony what his future condition may be.² Expert testimony is also admissible upon the question whether the sinking of a series of wells in the vicinity of a spring diverts its water.³

(9) In an action for personal injuries in being run over by a street-car, it is competent to ask a person who was standing on the platform of the car at the time of the injury as to whether, at the distance at which the injured person was standing at the time he was first warned of the approach of the car, the car would have passed without injuring him.⁴

(10) In an action for trespass to real property by defendant's cattle, a witness, after giving with minuteness the items of injury, may state the amount of damage done.⁵ And a witness, after stating the injury and being asked as to its extent, replied, "If it was on my own land I should hate to have it done for a couple of hundred dollars." This was held to be substantially responsive, and that the reference to the witness' own land was a mere mannerism which did not render it incompetent.⁶

(11) The safety of a highway is a proper subject of opinion evidence.⁷

(12) In a prosecution for abduction a physician may express an opinion that the genital organs have been penetrated by force within a week.⁸ A physician may also state as to whether the plaintiff was feigning suffering, when the question went to the fact as to what the witness saw or dis-

¹ *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205.

⁵ *Argotsinger v. Vines*, 82 N. Y. 308; *Rogers v. Anson*, 42 Hun, 436.

² *Tozer v. New York Central & Hudson River R. Co.*, 38 Hun, 100.

⁶ *Id.*

³ *Van Wycklen v. City of Brooklyn*, 41 Hun, 418.

⁴ *McDermott v. Third Avenue R. Co.*, 44 Hun, 107.

⁷ *Baltimore and Liberty Turnpike Co. v. Cassell*, 61 Md. 419; 59 Am. Rep. 175.

⁸ *People v. Stott*, 5 N. Y. Crim. Rep. 61.

covered.¹ A witness may state the number of horse-power obtainable from a specified quantity of water.²

(13) On the question whether work on a building was well done, an expert who performed part of the work may state whether or not the work was "a good job," and if it was "well done."³ In an action by an employee of a railroad company to recover for injuries sustained by the falling of a bridge, an expert who has examined the debris of the bridge after the accident may state his opinion as to the cause which produced the falling of the bridge.⁴

(14) In an action for damages caused by the defendant setting a fire on his lands, the opinion of persons of experience, as to whether the fire was set at a proper time, were held to be competent in *Ferguson v. Hubbell*.⁵ One familiar with a stock of goods and the sales therefrom may give his opinion as to the question of value.⁶

(15) A statement by a witness that, "to the best of my judgment," a certain condition of things was a fact, "but I won't be positive," is but a statement of his best recollection, and is properly received.⁷

(16) Expert witnesses may give their opinion as to whether another witness' testimony shows him possessed of sufficient science and skill to enable him to testify as an expert.⁸

(17) One experienced in shipping cattle may give an opinion, in answer to a hypothetical question, as to the effect of the wreck of a cattle train, and delay in consequence, upon shrinkage of the cattle in weight and the extent thereof.⁹

(18) A witness may give his opinion of the value of the plaintiff's services as described.¹⁰ But it seems a hypothetical question should be put and an opinion given thereon.¹¹

¹ *Tisdale v. Delaware & Hudson C. R. Co.*, 116 N. Y. 416; 4 N. Y. State Rep. 812.

² *Garwood v. New York Central & Hudson River R. Co.*, 45 Hun, 128.

³ *Ward v. Kilpatrick*, 85 N. Y. 413; 39 Am. Rep. 674.

⁴ *Vosburg v. Lake Shore & M. S. R. Co.*, 14 N. Y. Weekly Dig. 514.

⁵ 26 Hun, 250.

⁶ *Rober v. Bowe*, 30 Hun, 379.

⁷ *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514.

⁸ *Buehler v. Reich*, 44 N. Y. State Rep. 498. But see *Bowen v. Huntington*, 35 W. Va. 632.

⁹ *Ft. Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 104.

¹⁰ *McCullom v. Seward*, 52 N. Y. 316.

¹¹ *Reynolds v. Robinson*, 64 N. Y. 589.

(19) The opinions of persons experienced in dealings in stock is admissible to show the value of stocks that are not dealt in, but held as investments.¹

(20) That a spot or stain is blood may be proved by any person who has observed it and is able from observation to state the fact.² But it is different, it seems, where the question is as to whether the spot is human blood or that of an animal.³

(21) A physician may testify that the grasp of a person falling from a street-car upon the railing might come from spasmodic contraction of the muscles not fully under the control of the will.⁴

(22) A witness having the means of knowledge may testify whether in her opinion the plaintiff was sincerely attached to defendant,⁵ and as to the degree of affection entertained by a wife for her husband.⁶

§ 5. Opinions not allowable when.—(a) It is not sufficient to warrant the introduction of expert evidence that the witness may know more on the subject on inquiry, and may better comprehend and appreciate it, than the jury; but to warrant its introduction the subject of the inquiry must be one relating to some trade, profession, science or art in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have.⁷

(b) Negative conclusions are not admissible without the evidence from which the conclusions are to be drawn;⁸ and opinions of witnesses, expert or other, are not admissible when the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can

¹ *Sistare v. Olcott*, 15 N. Y. State Rep. 248.

² *People v. Gonzales*, 35 N. Y. 61; *Greenfield v. People*, 85 id. 82; *People v. Deacon*, 109 id. 374.

³ *Id.*

⁴ *Ganiard v. Rochester City & B. R. Co.*, 50 Hun, 22; 18 N. Y. State Rep. 692.

⁵ *McKee v. Nelson*, 4 Cow. 355.

⁶ *Trelowney v. Coleman*, 2 Stark. 191.

⁷ *Higgins v. Dewey*, 107 Mass. 494; *Luce v. Dorchester Mut. F. Ins. Co.*, 105 id. 297; *Ferguson v. Hubbell*, 97 N. Y. 507; *Hays v. Miller*, 70 id. 112; 6 Hun, 320; *Frazer v. Tupper*, 29 Vt. 409; *Bills v. City of Ottumwa*, 35 Iowa, 109; *Concord R. Co. v. Greely*, 23 N. H. 237.

⁸ *Manning v. Dem (Cal.)*, 24 Pac. Rep. 1092.

be estimated by all men without special knowledge or training;¹ and a witness will not be permitted to state an inference or conclusion from a state of facts, which it is the province of the jury to draw for themselves.² Thus, a witness cannot state what is a proper time to burn fallow.³

(c) A physician who has set plaintiff's arm cannot be asked as to how he would say the fracture was caused, it being a mere conjecture.⁴ And in an action on a marine policy of insurance, the question whether in the judgment of the witness the vessel and cargo could have been saved by certain acts is inadmissible, the question at issue being whether there was ordinary care and skill in navigating.⁵ The termination of splints which have been used upon a broken limb cannot be shown by expert testimony.⁶

(d) No amount of science, study or skill will enable a person, by mere inspection, to judge or testify of the age of handwriting with that accuracy necessary to its value or safety.⁷

(e) In an action to recover damages for the breach of a contract to form and continue a partnership for a specified term, the opinion of a witness as to the value of the contract to plaintiff, or as to what would have been his share of the profits had the contract been carried out, is incompetent.⁸

(f) To render an opinion of a witness competent as to the value of a dog it must be shown that the dog in question is a marketable animal, that it belonged to some particular breed or possessed some peculiar qualities which made him an animal usually vendible, had some approximate regular price, and that there was a market value for that kind of dogs.⁹

¹ *Graham v. Pennsylvania Co.*, 139 Pa. St. 149. 114 N. Y. 380; 1 N. Y. State Rep. 261.

² *Schneider v. Second Ave. R. Co.*, 133 N. Y. 583; 44 N. Y. State Rep. 680; *National Gas Light & F. Co. v. Miethke*, 35 Ill. App. 629; *Reeves v. State (Ala.)*, 11 S. Rep. 296. ⁵ *Boice v. Thanus & M. & M. Ins. Co.*, 38 Hun, 246.

³ *Ferguson v. Hubbell*, 97 N. Y. 507; *Kennally v. Selleck*, 21 N. Y. Weekly Dig. 72. ⁶ *Boldt v. Murray*, 2 N. Y. State Rep. 232; *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y. 305.

⁷ *Cheney v. Dunlap*, 27 Neb. 401. ⁸ *Reed v. McConnell*, 101 N. Y. 270. ⁹ *Dawson v. Wells*, 22 N. Y. Weekly Dig. 81.

⁴ *Francis v. New York Steam Co.*, 24

(g) The opinions of witnesses as to the object of transactions with third persons are inadmissible.¹

(h) In a criminal prosecution for libel, where the name of the person alleged to have been libeled was not mentioned in the article upon which the prosecution was based, witnesses cannot state whether, when they read the article, they recognized its application to any particular individual.²

(i) An opinion that a result may follow an injury, or that it is likely to accrue, is not to be received. There must be such a degree of probability as amounts to a reasonable certainty that the result will flow from the injury.³

(j) Evidence of a lawyer of another state as to what, in the opinion of lawyers there, should be the construction of a statute of that state, is not admissible, where there is no decision by the courts of the state upon the point in controversy.⁴

(k) A witness cannot state whether the egress to a building was safe;⁵ or whether property carried upon the deck of a canal-boat is properly covered so as to protect it from rain.⁶ A witness cannot give an opinion on the very question to be determined by the jury. In an action for assault and battery, the plaintiff, if not an expert, is incompetent to testify that a blow upon her ear made her entirely deaf.⁷

(l) In an action upon an insurance policy covering a building and machinery therein, an estimate of the cost of the machinery, made by an expert from description given by plaintiff, is incompetent, in the absence of evidence proving that such articles as are included in the estimate were in the building at the time of the fire.⁸

(m) A witness cannot testify to a mere matter of opinion, excluding the facts upon which his opinion is based—that is, to an abstract question.⁹ Thus, a witness cannot state the pecun-

¹ *People v. Sharp*, 14 N. E. Rep. 310.

² *People v. Barr*, 42 Hun, 313.

³ *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459; 6 N. Y. State Rep. 49.

⁴ *Hennesey v. Farrelly*, 13 Daly, 468.

⁵ *Schwander v. Birge*, 46 Hun, 66; 10 N. Y. State Rep. 802.

⁶ *Schwinger v. Raymond*, 105 N. Y. 648.

⁷ *Stevens v. Rogers*, 25 Hun, 54.

⁸ *Machin v. Lamar F. Ins. Co.*, 90 N. Y. 689.

⁹ *Hardenburgh v. Cockroft*, 5 Daly (N. Y.), 79; *Whitmore v. Biscoff*, 5 Hun, 126; *Richardson v. Northrop*, 66 Barb. 85; *Thompson v. Dickhart*, id. 604.

itary amount of damage which property has sustained by reason of a nuisance, or the deterioration in value of cattle from certain causes described by other witnesses.¹

(*n*) Evidence of the market value, or reasonable value, of a loan of credit is incompetent.² So is an opinion as to the pecuniary responsibility of another.³

(*o*) On the issue of mental capacity, a non-expert witness is not competent to testify to the impressions made on his mind by the acts and conversations of the person in question.⁴

(*p*) Suspicions are not proper evidence for any purpose.⁵ Expert evidence is not admissible to prove that fire would not destroy the mats of grass, when the effect of the fire on the roots of the grass sued for was susceptible of direct proof;⁶ and what is the proximate cause of an injury is ordinarily a question for the jury, and not a question of science or legal knowledge.⁷ Thus, witnesses are not qualified to give their opinion that an overflow of a river was caused by a railroad embankment.⁸

II. FORM OF QUESTIONS AND ANSWERS.

(1) Questions put to an expert on direct examination must be framed hypothetically, unless there is no conflict of evidence as to the facts, or the witness is personally acquainted with them;⁹ and a hypothetical question must be based upon facts which there is evidence to prove,¹⁰ and upon facts admitted, or upon facts which the jury are to pass upon, on conflicting evidence;¹¹ and must be based on a specific question covering all the facts or the assumed facts as to which the opinion is required, and not upon the testimony which he has heard.¹² But it is not necessary that a hypothetical case

¹ Schermerhorn v. Tyler, 11 Hun, 549.

² Clancey v. Losey, 65 Hun, 625; 48 N. Y. State Rep. 191.

³ Denman v. Campbell, 7 Hun, 88.

⁴ Yeandle v. Yeandle, 13 N. Y. State Rep. 586.

⁵ Barney v. Fuller, 133 N. Y. 605; 44 N. Y. State Rep. 902.

⁶ Gates v. Chicago & A. R. Co., 44 Mo. App. 488.

⁷ Ford v. Illinois R. Co., 40 Ill. App. 222.

⁸ Gulf, C. & S. F. R. Co. v. Hepner, 83 Tex. 136.

⁹ State v. Maier, 36 W. Va. 757.

¹⁰ Russ v. Wabash Western R. Co., 112 Mo. 45.

¹¹ People v. Harris, 136 N. Y. 423; 49 N. Y. State Rep. 751.

¹² Re Snelling's Will, 136 N. Y. 315; 49 N. Y. State Rep. 695; Fisher v.

should be an exact reproduction or accurate presentation of the evidence adduced.¹ The answer by an expert witness to a hypothetical question should be stricken out when he states that it is partly made from his own knowledge of the facts of the case.² So an expert cannot be asked a question which requires him to pass upon or draw inferences from the evidence given in the case by another witness.³

(2) Purely imaginary or abstract questions, assuming facts or theories for which there is no foundation in the evidence, are not admissible as matter of right. On cross-examination, such abstract or theoretical questions, not founded upon the facts of the case on trial, may be put, for the purpose of testing the knowledge and information of the witness as to the subject upon which he has been examined, and his competency to give the opinion which he may have pronounced on his direct examination. But the allowance of such questions, like other collateral inquiries touching only the credibility of the witness, rests in the discretion of the court; and, when the discretion is fairly exercised, it is not error to exclude them.⁴

(3) The form of questions to be asked of experts is within the discretion of the presiding judge.⁵ A hypothetical question must state the facts assumed to be proved, upon which the opinion of the witness is called for.⁶

(4) Counsel in framing hypothetical questions to be put to expert witnesses are not confined to facts admitted or absolutely proved, but facts may be assumed, where there is evidence on either side tending to establish them, and which are pertinent to the theories they are attempting to uphold; and upon cross-examination counsel may assume any facts pertinent to the inquiry, whether testified to by witnesses or not, with a view of testing the skill and accuracy of the expert.⁷

(5) It is not the province of an expert to draw inferences

Monroe, 51 N. Y. State Rep. 585;
Briggs v. Minneapolis St. R. Co.
(Minn.), 53 N. W. Rep. 1019.

⁵ Roraback v. Pennsylvania Co., 58
Conn. 292.

¹ Baker v. State, 30 Fla. 41.

² Fuller v. Jackson, 92 Mich. 197.

³ Link v. Sheldon, 136 N. Y. 1; 48
N. Y. State Rep. 820.

⁶ Sebrell v. Barrows, 36 W. Va. 212;
Butts v. Village of Lowville, 15 N. Y.
Weekly Dig. 144.

⁷ Dileber v. Home Life Ins. Co., 87
N. Y. 75.

⁴ People v. Augsbury, 97 N. Y. 501.

from the evidence of other witnesses, or to take in such facts as he can recollect, and thus form an opinion. He should have full information as to the ascertained or supposed state of facts upon which his opinion is based; he cannot be called upon to determine the truth of facts sworn to before giving such opinion; nor can he be called upon to testify unless a clear state of facts appears. And the opinion of a witness, based upon facts hypothetically stated to him, is not admissible, unless the hypothetical question embodies substantially all the facts relating to the subject upon which his opinion is based.¹ But in *Bowen v. Huntington*² and *Ft. Worth & D. C. R. Co. v. Greathouse*,³ the court held that the failure of an accurate statement of all the facts in propounding a hypothetical question to a witness would not render it inadmissible if sufficient was given upon which he could formulate an intelligent opinion. When the facts are controverted or not entirely clear, a hypothetical question may be put based upon the facts claimed to have been proven by the evidence.⁴

(6) A party may be asked whether he took possession of certain property.⁵

(7) Upon trial of one indicted for murder wherein insanity is set up as a defense, a lay witness for defendant who has given the details of an interview with him on the same evening a short time prior to the homicide may be asked "were his acts at eight o'clock that night rational or irrational?"⁶

(8) A question, "If M. had been in her room at the time of the shooting would not you have seen her there?" is proper, as calling for a fact and not a conclusion.⁷

(9) A lay witness cannot state that from what he had observed in the acts and conversation of a person he thought that his mind was gone and that he was an imbecile.⁸ But such witness, after testifying to facts and incidents tending

¹ *Senn v. Southern R. Co.*, 108 Mo. Hun, 119; *Clapp v. Fullerton*, 34 142; *Truesdale Mfg. Co. v. Hoyle*, 39 N. Y. 190; *O'Brien v. People*, 36 id. 282; *Hewlett v. Wood*, 55 id. 634; *Halcomb v. Halcomb*, 95 id. 316.

² 35 W. Va. 682.

³ 82 Tex. 104.

⁴ *Bowen v. Huntington*, 35 W. Va. 682. ⁷ *People v. Chacon*, 3 N. Y. Crim. Rep. 418.

⁵ *Keller v. Paine*, 34 Hun, 167.

⁶ *People v. Conray*, 97 N. Y. 62; 33

⁸ *Halcomb v. Halcomb*, 95 N. Y. 316.

to show unsoundness of mind, may testify as to the impression produced upon his mind thereby as to whether such acts were rational or irrational.¹

(10) Where the opinion is the mere short-hand rendering of the facts, then the opinion can be given subject to cross-examination as to the facts on which it is based.² A witness may state that the barrel of a pistol was cold and there was no indication that it had been fired.³

(11) Upon the trial of an action for personal injuries it is proper to ask an expert as to the usual effect of a certain internal injury, falling of the womb, and whether it usually permanently affects the health and strength of the patient,⁴ and as to the probable result of the injuries;⁵ and in such case it is not error to permit the medical experts to state what, in their judgment, will be the probable result of the particular injury in question;⁶ and the probabilities as to plaintiff's recovery derived from the history of similar cases, and as to the natural and ordinary course of plaintiff's disease.⁷

(12) Where personal property has been described by witnesses, a dealer in such articles, but who has never seen the property in question, may be asked a hypothetical question as to the value of the property, the same being described in the question as testified to by the other witnesses.⁸

(13) A medical man conversant with the disease of insanity may be asked the general question, and give his opinion, as to the sanity or insanity of the person whose sanity is in question;⁹ while a layman, except an attesting witness, cannot testify to an opinion on the general question, but only impressions produced by what he witnessed.¹⁰ Thus, a layman may state

¹ *Hewlett v. Wood*, 55 N. H. 634;
Spence v. Brown, 17 N. Y. Weekly
Dig. 518.

² 1 *Whart. Ev.*, § 510; *Wynne v. State*, 56 Ga. 113; *Commonwealth v. Sturtivant*, 117 Mass. 122.

³ *People v. Driscoll*, 117 N. Y. 414;
9 N. Y. State Rep. 820.

⁴ *Harrold v. New York Central & Hudson River R. Co.*, 13 Daly, 378;
Strohm v. New York, L. E. & W. R. Co., 95 N. Y. 305.

⁵ *Griswold v. New York Central & Hudson River R. Co.*, 44 Hun, 236.

⁶ *Filer v. New York Central & Hudson River R. Co.*, 49 N. Y. 42.

⁷ *Alberti v. New York, L. E. & W. R. Co.*, 43 Hun, 421.

⁸ *Whyton v. Snyder*, 88 N. Y. 299.

⁹ *Brown v. Murdock* (N. Y.), 12 Abb. N. C. 360; *Cotrell v. Com.*, 13 Ky. L. Rep. 305; *Foster v. Dickerson*, 64 Vt. 233.

¹⁰ *Bell v. McMarter*, 29 Hun, 272;
White v. Davis, 62 id. 622; 42 N. Y. State Rep. 901.

the acts and conversations of a grantor alleged to be mentally incapable of making a valid deed, of which he has personal knowledge, and then say whether in his judgment such acts and conversations are those of a rational or irrational man; but he cannot testify whether in his opinion, based upon specified acts and conversations and his personal observation, not given in evidence, the grantor was rational or irrational.¹

(14) A general objection to a question calling for an opinion as to the existence of a material fact is not good. The objection should particularly state the ground therefor.²

(15) In an action for personal injuries it is proper to ask physicians "whether in their opinion the physical condition in which they found the plaintiff to be upon their examination of her could have resulted from a fall,"³ and whether a laceration found upon the lip of a deceased person could or could not have been made in the absence of any outside mechanical force;⁴ or whether pregnancy would result from the first intercourse in a case where the woman had been ravished.⁵ And in an action to recover upon a delivery of iron, where the defense was a breach of warranty of quality, it is proper to ask an expert, "What do you expect to find in Coltness iron particularly?"⁶

(16) Upon the issue of the testamentary capacity of a decedent it is proper to permit hypothetical questions reasonably descriptive of decedent's condition and disease as shown by other testimony, with an inquiry as to their opinions of the resulting mental condition of the patient, and his capacity to concentrate his thoughts on matters of business, to resist importunity, and generally to overcome influence.⁷ In connection with their opinion, they can state the reasons upon which it is founded.⁸ But inferences from the facts are to be drawn and found by the jury, and cannot be proved as facts by the opinions of witnesses.⁹

¹ Paine v. Aldrich, 133 N. Y. 544; 44 N. Y. State Rep. 308.

² Re Crosby v. Day, 81 N. Y. 242.

³ Turner v. City of Newburgh, 109 N. Y. 301.

⁴ People v. Wilson, 109 N. Y. 345.

⁵ Young v. Johnson, 46 Hun, 164.

⁶ Abenheim v. Samuel, 16 N. Y. State Rep. 907.

⁷ Fiero v. Paulding, 6 N. Y. Supp. 122.

⁸ Lewiston, etc. Co. v. Androscoggin Water Power Co., 78 Me. 274.

⁹ People v. Barber, 115 N. Y. 475; 26 N. Y. State Rep. 194.

(17) A layman can state that a person was drunk at a certain time.¹

(18) The question, "Does the testimony you have heard on that subject satisfy your mind?" etc., is not admissible, because it calls upon the witness to weigh the evidence he has heard.² So a witness cannot be asked, "What have you to say on the testimony you have heard on that subject."³

(19) A hypothesis submitted for the opinion of an expert witness must be based upon the proofs, and must not go outside of the facts as to which some evidence has been given;⁴ and such facts, or some of them, must be embodied in the question.⁵ It is improper to single out facts supposed to be material and discard other evidence;⁶ nor can the questions be based partly on assumed facts which have been proved, partly upon assumed facts as to which there is no proof, and partly upon portions of the testimony of other witnesses which the witness testifying heard.⁷

(20) The opinions of witnesses as to value may be based upon a hypothetical statement of what has been already proved in the case as to the quality, condition and situation of the property;⁸ and they cannot be called upon to state the grounds of their opinion or the mental process by which they arrive at the result.⁹ A witness cannot fortify his opinion by incompetent facts, even if the evidence might have been properly admitted on cross-examination to test the opinion of the witness as an expert.¹⁰ In *State v. Watson*¹¹ it was held that where a witness states to the jury particular facts in the presence of an expert witness on which the expert is to state his opinion, and the latter follows the former while the facts are fresh in

¹ *McCarthy v. Wells*, 20 N. Y. State Rep. 630.

² *Loveless v. Manhattan Ry. Co.*, 5 N. Y. Supp. 185.

³ *Uransky v. Dry Dock, E. B. & B. R. Co.*, 59 Hun, 626; 37 N. Y. State Rep. 543; *Allen v. Union Pacific R. Co.*, 7 Utah, 239.

⁴ *People v. Smiler*, 125 N. Y. 717; 35 N. Y. State Rep. 1.

⁵ *Connelly v. Manhattan R. Co.*, 39 N. Y. State Rep. 561; 60 Hun, 495.

⁶ *People v. Vanderhoof*, 71 Mich. 158.

⁷ *Re Mason*, 60 Hun, 46; 28 N. Y. State Rep. 533. But see *Kraatz v. Brush Electric Light Co.*, 82 Mich. 457.

⁸ *Moore v. Chicago & St. Paul R. Co.*, 78 Wis. 120.

⁹ *Kingsland v. New York*, 60 Hun, 489; 39 N. Y. State Rep. 433.

¹⁰ *Hunt v. Boston*, 152 Mass. 168.

¹¹ 82 Iowa, 380.

the minds of the jury, the facts need not be again stated in the question to the expert.¹

(21) An expert cannot be asked or allowed to state to what extent, in his judgment, the value of property was damaged, if at all, by the presence of the structure of a railroad and the running of its trains;² nor can an expert testify what, in his judgment, the property would be worth without the railroad;³ nor can he state as to the value of the lots if there were no interference with the light, air and access;⁴ nor can he state what, in his opinion, was the best use to which the property could have been put if it had not been for the railroad and its interference with the light, air and access.

(22) A witness may state whether a bed which he saw appeared as if anybody had been recently sleeping in it.⁵

(23) The following questions put to a medical expert are proper: "What results will follow, with reasonable certainty, from the injuries which you observed?"⁶ and whether the absence of external appearance of injury is consistent with his medical books;² and, if the spinal cord had been injured by the accident, what would be the probable result of such injury?⁸

(24) In any case where the facts are undisputed, an expert may be asked as to the conclusions to be drawn from them;⁹ and the question need not embrace every fact proved or which there is evidence tending to prove.¹⁰

(25) An expert may be asked as to his knowledge of the existence of a custom or usage of which he must have heard if it existed.¹¹

(26) A witness cannot be asked such questions as these: "How much, in your opinion, was the damage sustained by

¹ And see *Abbott v. Dwinnell*, 74 Wis. 514; *Jones v. Chicago, St. P., M. & O. R. Co.* (Minn.), 45 N. W. Rep. 444.

² *Roberts v. New York El. R. Co.*, 128 N. Y. 455; 40 N. Y. State Rep. 454.

³ *Doyle v. Manhattan R. Co.*, 40 N. Y. State Rep. 478; 128 N. Y. 488.

⁴ *Gray v. Manhattan R. Co.*, 128 N. Y. 499.

⁵ *People v. Fanshawe*, 47 N. Y. State Rep. 331.

⁶ *Forde v. Nichols*, 36 N. Y. State Rep. 729.

⁷ *Blair v. Madison County*, 81 Iowa, 313.

⁸ *Abbott v. Dwinnell*, 74 Wis. 514.

⁹ *Fort Worth & D. C. R. Co. v. Thompson*, 75 Tex. 501.

¹⁰ *Gulf Coast & San Francisco R. Co. v. Compton*, 75 Tex. 667.

¹¹ *Ambler v. Phillip*, 132 Pa. St. 167.

the plaintiff in consequence of feeding the cattle the poor hay instead of that agreed upon?"¹ "What damages, in your opinion, has the plaintiff sustained?"² "From the description of the property in question, as given by the witness, what would the damages be?"³ "Was the note that of the old firm or of the new one?"⁴ "What was the damage to plaintiff by reason of the saw-mill lying still for a fortnight?"⁵ "or by the erection of another mill on the same stream, or by the withdrawal of water from plaintiff's tavern?"

(27) Subscribing witnesses to a will may be inquired of generally as to the judgment they formed of the sanity of the testator's mind at the time of the execution of the will.⁶

(28) A question to a medical expert as to what declarations of a testatrix, testified to by another witness, assuming the truth of such testimony, indicate to the witness' mind as to testatrix's mental condition, is not objectionable as requiring him to weigh or reconcile conflicting evidence.⁷

III. WHAT WITNESSES MAY STATE OPINIONS.

An expert is one instructed by experience, and to become such requires a course of previous habit and practice, or of study, so as to be familiar with the subject;⁸ and none but those who are shown to possess peculiar means of forming an intelligent and well-instructed judgment are competent to give an opinion on questions involving skill or science.⁹ Thus, the fact that a witness is familiar with earth dams does not render him competent to testify as an expert in regard to wooden dams.¹⁰ A witness having some knowledge of value on which to base opinion can testify, there being no fixed rule as to the extent of knowledge.¹¹ Boat builders or captains of boats are competent to express an opinion of the

¹ *Morehouse v. Matthews*, 2 N. Y. 514.

² *Norman v. Wells*, 17 Wend. 136.

³ *Paige v. Hazzard*, 5 Hill, 603.

⁴ *Herroy v. Van Pelt*, 4 Bosw. (N. Y.) 60.

⁵ *Doolittle v. Eddy*, 7 Barb. 74.

⁶ *Clapp v. Fullerton*, 34 N. Y. 190.

⁷ *Foster v. Dickerson* (Vt.), 24 Atl. Rep. 253.

⁸ *Pendleton v. Saunders* (Oreg.), 24 Pac. Rep. 506.

⁹ *Gourley v. St. Louis & S. F. R. Co.*, 35 Mo. App. 87; *Little Rock & Fort Scott R. Co. v. Bruce*, 55 Ark. 65.

¹⁰ *Wiedekind v. Tuolumne County Water Co.*, 83 Cal. 198.

¹¹ *Avery v. New York Central & Hudson River R. Co.*, 121 N. Y. 31; 17 N. Y. State Rep. 417.

value of a boat they have seen.¹ A woman who has borne children is competent to testify that a woman at a certain time appeared to be pregnant.² Those who are employed in the business of railroading come within the rule rendering admissible the opinions of those who are engaged in a particular trade or art.³ Thus, an experienced conductor and engineer of a train may state whether, under a special order, it is necessary for a train to stop at a certain station.⁴ And one who has been engaged for thirteen years in the manufacture of paris green is competent to testify as to its effect in producing cutaneous diseases and paralysis.⁵ And a witness who worked with one suing for negligence, both before and after the injury, although not a medical expert, may testify to his ability to do a good day's work after as before the accident.⁶ And the plaintiff in an action for personal injuries may testify as to mental injuries received.⁷

IV. OPINIONS AS TO QUANTITY, DISTANCE, SPEED, TIME.

(a) Expert testimony is proper to prove what would have been the size of the waves, in a particular place, caused by a wind blowing at the rate of sixty miles per hour.⁸

(b) In an action for services rendered, the plaintiff may testify that he did "a full man's work every day."⁹

(c) An expert witness may state the result of his examination of books and papers which are in evidence and are too voluminous to be conveniently examined in court.¹⁰ So experts may state the proper diameter of the base of columns to rest on certain sills of fixed size.¹¹ A brakeman may state that the engineer backed the tender against the car with more

¹ Keller v. Paine, 34 Hun, 167; Judson v. Easton, 58 N. Y. 664.

² Sturges v. Wiltsee, 19 N. Y. Weekly Dig. 266; Doe v. Roe, 32 Hun, 628; People v. Blake, 73 N. Y. 586.

³ Forth Worth & D. C. R. Co. v. Thompson, 75 Tex. 501.

⁴ Albert v. Sweet, 116 N. Y. 363; 26 N. Y. State Rep. 738.

⁵ Fox v. Peninsular White L. & C. Works, 92 Mich. 243.

⁶ Langworthy v. Green Tp., 88 Mich. 207.

⁷ Spurrier v. Front Street Cable R. Co., 3 Wash. 659.

⁸ Ilfrey v. Sabine & E. T. R. Co., 76 Tex. 63.

⁹ Elison v. Jones, 15 N. Y. Supp. 356.

¹⁰ State v. Findlay, 101 Mo. 217.

¹¹ Linch v. Paris Lumber & G. Elevator Co., 80 Tex. 23.

than necessary force;¹ and one who has been a driver on a horse-car may state within what time or space a driver could stop a car with one horse going on a moderate trot on level ground.² And any witness may state his own observation and experience as to the distance within which a train can be stopped.³ So any one may state how far one could ordinarily see a horse along the railroad track. And a witness familiar with a railroad track may testify how far in each direction cattle on a track can be seen from a certain point by an engineer or other person.⁴ So expert witnesses may testify as to the distance within which a truck could be stopped under certain conditions of the pavement as to speed, etc.⁵

(d) Locomotive engineers, firemen, switchmen and foremen of yard-engines are *prima facie* experts and competent to give their opinions as to speed of trains.⁶ And one who sees a moving train may testify as to its rate of speed, though he has not timed moving trains. Such a qualification goes to the weight, not to the competency, of his evidence.⁷ The opinion of an experienced architect is admissible as to the length of time necessary to remove the debris of a burnt mill previous to rebuilding.⁸ So is a builder of bridges as to how long stringers in bridges usually last.⁹ So as to how long a certain kind of lumber will last.¹⁰ But a witness cannot testify to the time usually required to fill a cattle-guard with snow.¹¹

(e) An expert may state that a ditch, as repaired, is wider and deeper than the original, and also the grade of a ditch; that a particular drain is not large enough to carry the water conveyed into it by a certain cut, and that before the cut was made it was sufficiently large to convey the waters which

¹ Louisville & N. R. Co. v. Watson, 90 Ala. 68.

² O'Neil v. Dry Dock E. B. & B. R. Co., 129 N. Y. 125; 26 N. Y. State Rep. 936.

³ Harmon v. Columbia & G. R. Co., 32 S. C. 127.

⁴ Gulf Coast & S. F. R. Co. v. Washington, 49 Fed. Rep. 437.

⁵ O'Neil v. Dry Dock E. B. & B. R. Co., 129 N. Y. 125; 41 N. Y. State Rep. 107.

⁶ Brown v. Rosedale Street R. Co. (Tex.), 15 S. W. Rep. 120.

⁷ Walsh v. Missouri P. R. Co., 102 Mo. 582; Louisville, N. A. etc. R. Co. v. Hendricks, 128 Ind. 462; Pence v. Chicago, R. I. & P. R. Co., 79 Iowa, 389.

⁸ Chamberlain v. Dunlop, 126 N. Y. 45; 28 N. Y. State Rep. 375.

⁹ Blank v. Livonia Tp., 79 Mich. 1.

¹⁰ McConnell v. Osage (Iowa), 45 N. W. Rep. 550.

¹¹ Grahlman v. Chicago, St. Paul & K. C. R. Co., 78 Iowa, 564.

would naturally come to it; that he thinks an opening one hundred feet wide in a certain railroad embankment is sufficient to carry off the waters in times of ordinary flood.¹ So an expert street-car conductor may state within what distance an electric street-car going at a specified rate can be stopped.² So an expert may give his opinion as to the distance within which the engine could have been stopped when running at the rate of speed at which it is shown to have been running when it struck a person.³ But a master-mechanic who never drove a car cannot so testify.⁴

(f) A witness may state as a conclusion of fact, based upon observations made by him at the time of an accident, as to the rate of speed of a car and the exertion made by the motor-man to stop it, and that the car was running at too high a rate of speed to stop it in the distance between the car and the wagon hit by it when he discovered that the wagon would not get out of the way.⁵

(g) In *New York, L. E. & W. R. Co. v. Estell*,⁶ it was held that one who came with certain cows from Scotland to this country, accompanying them while being transported by rail to Missouri, may, in an action by the owner against the railroad company for injuries to them by its negligence which it was claimed caused them to abort their calves, be allowed to testify whether, from his experience as a shipper of this kind of cattle, the trip across the ocean and detention in quarantine and the shipment by rail would cause them to abort their calves if no accident had happened to them.

V. CARE, SKILL, NEGLIGENCE—PROPER CAUSE OF ACTION.

(1) As a general rule a question which proposes to substitute the opinion of a witness on the question of prudence and care is inadmissible.⁷ And whether a particular act consti-

¹ *Kansas City, F. S. & M. R. Co. v. Chicago, St. P., M. & O. R. Co.* (Wis.) Cook, 57 Ark. 79; *Osten v. Jerome*, 55 N. W. Rep. 771.

² *93 Mich. 196; Posachane Water Co. v. Standart* (Cal.), 32 Pac. Rep. 532; *N. Y. State Rep. 705.*

³ *Romack v. Hobbs* (Ind.), 32 N. W. Rep. 307. ⁴ *Sears v. Seattle Con. Street Co.* (Wash.), 33 Pac. Rep. 389.

⁵ *Watson v. Minneapolis Street R. Co.* (Minn.), 55 N. W. Rep. 742. ⁶ 147 U. S. 591.

⁷ *Schlereth v. Missouri P. R. Co.* (Mo.), 21 S. W. Rep. 1110; *Ward v. Murtaugh v. New York Central & Hudson River R. Co.*, 49 Hun, 456.

tuted negligence, and whether due care required a certain act to be done, are not matters of expert testimony, but of judgment and common experience, to be determined by the jury upon the facts and circumstances.¹ Thus, expert evidence or the opinions of witnesses are not admissible upon the question as to what means would be safe or ordinarily prudent to put out accidental fires in a boiler-room or saw-mill.² A witness cannot give his opinion of the safety of a rule given for the guidance of railroad employees;³ or whether a person was generally a careful and skilful man;⁴ or whether decedent got as far off the track as he could before the train sucked him under;⁵ or as to the manner in which a brakeman attempted to make a coupling;⁶ or whether or not a cattle-guard could be maintained at a particular place without increasing the danger to trainmen.⁷

(2) Testimony of a witness as to care and skill has been allowed. Thus, a physician may state, from his own knowledge, as to the skill of another physician, who has previously testified, to show the value of the latter's evidence.⁸ So the opinion of a witness as to negligence in setting a fire to brush in a time of high wind, and in the management of the fire, is competent where he had knowledge of the situation, and observation of the wind, and of the acts and omissions of defendant.⁹ So a witness may state that a turn-table is dangerous for children to ride upon;¹⁰ or that the platform of a caboose was in bad condition and insufficient.¹¹

(3) The fact of care or carelessness of an employee in operating a machine is not one involving any question of skill or science, nor one founded upon any knowledge peculiar to

¹ *Bergquist v. Chandler Iron Co.*, 49 Minn. 511.

² *McNally v. Coiwell*, 91 Mich. 527; *Cowley v. Colwell*, 52 N. W. Rep. 73; *State v. Summers*, 36 S. C. 479; *Bryant v. Randolph*, 133 N. Y. 70; 44 N. Y. State Rep. 85.

³ *Nary v. New York, O. & W. R. Co.*, 125 N. Y. 759; 29 N. Y. State Rep. 630.

⁴ *Southern Kansas R. Co. v. Robbins*, 43 Kan. 145.

⁵ *Shervey v. Evansville & T. H. Co.*, 121 Ind. 427.

⁶ *Seese v. Northern Pacific R. Co.*, 39 Fed. Rep. 487.

⁷ *Pennsylvania R. Co. v. Mitchell*, 124 Ind. 473.

⁸ *Thompson v. Ish*, 99 Mo. 160.

⁹ *Wells v. Eastman*, 61 N. H. 507.

¹⁰ *Bridger v. Asheville & S. R. Co.*, 25 S. C. 24.

¹¹ *Van Gent v. Chicago, M. & St. Paul R. Co. (Iowa)*, 45 N. W. Rep. 913.

any class of persons, and may be testified to by one who is not an expert.¹ Thus, a witness may state that a party "examined the note thoroughly;"² "that plaintiff was capable of performing the work satisfactorily;"³ "that most any animal would throw it down;"⁴ and as to whether a railroad was properly constructed at the point where the accident occurred.⁵ Opinions of witnesses qualified by experience, to the effect that a hard-wood floor will become slippery by use so as to render it dangerous to stand on while working with a dangerous machine, while a soft-wood floor will not become slippery, are admissible.⁶

(4) Evidence of experts as to the usual methods adopted by railroads in the building of their roads, and as to the precautions it is customary to adopt to protect employees, is admissible.⁷ So is that of an experienced seaman relative to proper measures which should be taken to prevent stranding;⁸ and an expert may give his opinion as to the suitability of a stable.⁹

(5) A witness cannot testify in general terms that he acted cautiously;¹⁰ nor that the place where plaintiff stood at the time of the injury was reasonably safe;¹¹ nor that the change in a bridge left it reasonably safe for the ordinary uses of a highway bridge;¹² nor that a raised part of a station platform is a dangerous place;¹³ nor as to whether or not a trap-door is dangerous;¹⁴ nor that a fence built in a certain way is sufficient to hold stock;¹⁵ nor that it would not be proper to leave any-

¹ *McCarragher v. Rodgers*, 120 N. Y. 526; 31 N. Y. State Rep. 595.

² *Montgomery v. Crosthwait*, 90 Ala. 553.

³ *Hare v. Mahoney*, 61 Hun, 576; 37 N. Y. State Rep. 653.

⁴ *Chicago & A. R. Co. v. O'Brien*, 35 Ill. App. 155.

⁵ *Colorado Midland R. Co. v. O'Brien*, 16 Colo. 219; *St. Louis, A. & T. R. Co. v. Johnston*, 78 Tex. 536.

⁶ *Webber Wagon Co. v. Kehl*, 139 Ill. 644.

⁷ *Davidson v. Cornell*, 132 N. Y. 228; 31 N. Y. State Rep. 982.

⁸ *Hutchins v. Ford*, 82 Me. 363.

⁹ *Armstrong v. Chicago, M. & St. Paul R. Co.*, 45 Minn. 85. And see *Perry v. Jensen*, 142 Pa. St. 125.

¹⁰ *Mayfield v. Savannah, G. & N. A. R. Co.*, 81 Ga. 574.

¹¹ *Inland & S. Coasting Co. v. Tolson*, 139 U. S. 551.

¹² *McDonald v. State*, 37 N. Y. State Rep. 248; 127 N. Y. 18.

¹³ *Graham v. Pennsylvania Co.*, 139 Pa. St. 149.

¹⁴ *Rolb v. Sandwich Enterprise Co.*, 36 Ill. App. 419.

¹⁵ *Chicago & A. R. Co. v. O'Brien*, 35 Ill. 155.

thing lying around loose on the platform of a pile-driver;¹ nor that a dog-cart in which a person injured was riding was unsafe for the use of two persons riding together.²

(6) In an action for killing stock, an engineer and fireman on the locomotive may state that all that was possible was done to avoid collision with the stock.³ So a qualified witness may state that a machine was not properly handled by a person;⁴ and a qualified witness who has personally examined a place where an accident occurred may supplement his description of the place by his opinion as to its dangerous character, founded on his actual observation.⁵ So an expert may give his opinion as to whether or not a certain described scuttle-hole in a sidewalk is so constructed as to be safe for pedestrians passing along the walk,⁶ and whether the kind of fastener used is a safe and practical fastener;⁷ or that revolving shafting is dangerous machinery;⁸ and that cars having certain described bumpers are more dangerous and difficult to couple than a certain other make of cars.⁹ So one qualified may state that a boy of plaintiff's strength and size could not have unhitched a mule from a dump-cart in any other manner than that in which he attempted to do it;¹⁰ that machinery was reasonably adapted for the purpose for which it was used, and that it was in good repair.¹¹

(7) An expert may state as to how freight trains are made up on the road, when the duty of the yard-master ceases and that of the conductor begins, how cars are put in on end sidings, and as to the custom of switching cars.¹² But an expert cannot state that a person had sufficient opportunity to alight from a car if she had proceeded right out of the car, or whether or not a train stopped long enough to permit a

¹ *St. Louis, A. & T. R. Co. v. Jones* (Tex.), 4 S. W. Rep. 309.

² *Robinson v. Waupaca*, 77 Wis. 544.

³ *Little Rock & M. R. Co. v. Shoecraft*, 56 Ark. 465.

⁴ *Galveston Rope & T. Co. v. Barrett* (Tex.), 21 S. W. Rep. 958.

⁵ *McNerney v. Reading*, 150 Pa. St. 611.

⁶ *Benjamin v. Metropolitan St. R. Co.*, 50 Mo. App. 602.

⁷ *Harley v. Buffalo Car Mfg. Co.*, 65 Hun, 624; 48 N. Y. State Rep. 58.

⁸ *Pullman Palace Car Co. v. Harkins*, 55 Fed. Rep. 932.

⁹ *East Tennessee, V. & G. R. Co. v. Turvaille* (Ala.), 12 S. Rep. 63.

¹⁰ *Kehler v. Schwenk*, 151 Pa. St. 505; 31 Am. St. Rep. 777.

¹¹ *Alabama Connellsville Coal & I. Co. v. Pitts* (Ala.), 13 S. Rep. 135.

¹² *Price v. Richmond & D. R. Co.*, 38 S. C. 118.

passenger to safely alight;¹ or that timbers used were improper for the purpose, or were insufficient to hold the partition, or what should have been the length of anchors to sustain the partition;² or that a certain place was too narrow to allow a wagon to turn around on it with safety;³ or that a sidewalk was reasonably safe for public travel.⁴

(8) In an action for injuries to a vessel from striking on a rock in proximity to a wharf, it is proper to show that the vessel was properly loaded.⁵

(9) In an action for the death of a passenger from being struck by a train while crossing the track upon alighting from another train, evidence that the conductor of the latter train placed a stool on that side of the train to assist passengers in alighting is admissible.⁶

(10) In an action for injuries at a railroad crossing, where it is shown that the conductor in charge of a car saw the injured person while his car was at a certain distance from the place of injury, evidence as to the distance in which such a car with a sound brake could be stopped is competent, relevant and material.⁷ So is evidence of obstructions interfering with the view of the train from the road and the time it would take to cross.⁸ So is evidence of the absence of a flag-man at the place, and that no bell was rung or whistle blown as the train approached the crossing.⁹

(11) In an action by one whose foot was caught in a hole in a sidewalk which a railroad company was bound to maintain across its tracks, and who was run over by a train, evidence that others had their feet caught in the same hole, which had existed for a long time, is competent.¹⁰

¹ Illinois C. R. Co. v. Blye, 43 Ill. App. 612; Madden v. Missouri P. R. Co., 50 Mo. App. 666.

² Gerbig v. N. Y., L. E. & W. R. Co., 67 Hun, 649; 51 N. Y. State Rep. 534; Davis v. N. Y., L. E. & W. R. Co., 52 id. 740.

³ International & G. N. R. Co. v. Kuehn (Tex.), 21 S. W. Rep. 58.

⁴ Girard v. Kalamazoo, 92 Mich. 610.

⁵ McCaldin v. Parke, 52 N. Y. State Rep. 745.

⁶ Lustig v. N. Y., L. E. & W. R. Co., 48 N. Y. State Rep. 916; 65 Hun, 548.

⁷ Ward v. Chicago, St. P., M. & O. R. Co. (Wis.), 55 N. W. Rep. 771.

⁸ International & G. N. R. Co. v. Kuehn (Tex.), 21 S. W. Rep. 58.

⁹ Friess v. N. Y. C. & H. R. R. Co., 67 Hun, 205; 51 N. Y. State Rep. 391.

¹⁰ Retan v. Lake Shore & M. S. R. Co., 94 Mich. 146.

(12) A rule of a railroad company as to the signal for stopping a train is admissible upon the question of negligence of the engineer in failing to stop his train at the appearance of lights upon the track.¹ So a train-report sheet kept in the train dispatcher's office, showing the time of the starting of trains therefrom, is material on an issue as to whether the approach of an inward train was hidden from the plaintiff by a train outward.²

VI. SANITY AND MENTAL CAPACITY.

(a) In some states a non-expert witness may express his opinion as to the mental condition of a person, after having stated the facts upon which such opinion is based;³ but they cannot state whether a person was, in their opinion, rational or irrational, based upon their conversation with him;⁴ neither can a subscribing witness state as to whether testatrix had sufficient strength of mind to comprehend a clause of her will creating a charitable trust.⁵ It seems that a witness may properly compare the mind and memory of a testatrix as regarded the amount of property she was worth and the disposition she wished to make of it with that of a child of a specified age.⁶ But a non-expert cannot testify as to the impression made upon his mind that a person was failing very fast physically as well as mentally.⁷ Near neighbors and old friends of a testator, in the habit for years of visiting frequently, who describe him as lying in a stupor and unable to carry on a conversation, may give their opinion as to his competency to make a will or transact business.⁸ A master in chancery who has stated the appearance and deportment of a

¹ *Halton v. Alabama Midland R. Co. (Ala.)*, 12 S. Rep. 276. 439; *Chickering v. Brooks*, 61 Vt. 554.

² *Donovan v. Boston & M. R. Co.*, 158 Mass. 450; 47 Alb. L. J. 351. ⁴ *Paine v. Aldrich*, 133 N. Y. 544; 38 N. Y. State Rep. 402.

³ *State v. Leeman (S. D.)*, 49 N. W. Rep. 3; *Scaf v. Collins County*, 80 Tex. 514; *Territory v. Roberts*, 9 Mont. 12; *Bolling v. State*, 54 Ark. 588; *State v. Lewis*, 20 Nev. 333; *Burkhart v. Gladish*, 123 Ind. 337; *Blanton v. State (Wash.)*, 24 Pac. Rep. 473. ⁵ *Melanefy v. Morrison*, 152 Mass. 473.

⁶ *Richmond's Appeal*, 59 Conn. 226. ⁷ *Re Klock*, 49 Hun, 450; 19 N. Y. State Rep. 307.

⁸ *Swailles v. White*, 149 Pa. St. 261; *Cum. Title Ins. & T. Co. v. Gray*, 150 id. 255.

testatrix, and the questions asked her by counsel and her answers thereto on examination before him, may further state that he saw no indication of insanity in her;¹ and questions as to whether there was any change in the acts, conduct or manner of doing business of a person alleged to have been insane are not inadmissible as calling for opinions.² And a witness who had seen the deceased every day or two for four or five months, and had talked with him, is competent to testify on a trial for murder that he was a vicious, dangerous man.³ So the statements of a witness that the accused was "talking mad," and that the accused and another "were trying to fight or trying to get together," are admissible as being mere statements of facts.⁴

(b) An expert cannot state that a person has not sufficient mental strength to manage her estate or conduct her business;⁵ nor can the capacity of an employee to manage hands under him be shown by expert testimony, but the facts must be stated so that the jury may decide for themselves.⁶

(c) A witness who is not an expert may be allowed to testify to what a person said or did, and then he may be allowed, if he testifies to remarks made or acts done, to give his opinion as to whether such remarks or acts were rational or irrational; but even if he testifies to particular words spoken or particular acts done, he cannot then be allowed to go farther than to express his opinion as to whether such words and acts were rational or irrational.⁷ Thus, while non-expert witnesses cannot express a general opinion as to sanity, nor give an opinion independent of the facts and circumstances within their own knowledge, they can detail the facts known to them which show insanity, and characterize the acts and conversations detailed as rational or irrational.⁸ And a non-expert

¹ Foster v. Dickerson, 64 Vt. 233.

² White v. Davis, 62 Hun, 622; 42 N. Y. State Rep. 901.

³ Turner v. State, 5 Ohio C. C. 538.

⁴ Reeves v. State (Ala.), 11 S. Rep. 296.

⁵ Re Mason, 38 N. Y. State Rep. 533.

⁶ Troy Fertilizer Co. v. Logan, 90 Ala. 325.

⁷ Holcomb v. Holcomb, 95 N. Y. 316; White v. Davis, 62 Hun, 622; 42 N. Y. State Rep. 901.

⁸ People v. Taylor, 138 N. Y. 398; 52 N. Y. State Rep. 914; Armstrong v. State, 30 Fla. 170; Smith v. Smith, 157 Mass. 389; Hamrick v. State (Ind.), 34 N. E. Rep. 3; Jamison v. People, 145 Ill. 357; State v. Maier, 36 W. Va. 757; Stanley's Appeal, 62

witness cannot be permitted to express an opinion or characterize acts and conversations of a person until he has testified to something in the appearance or conversation of the party which is sufficient at least to justify the inference of incompetency;¹ and when the grounds of such opinion are trivial, or merely such incidents as are common alike to sane and insane people, such opinion should not be allowed.² But witnesses in rebuttal on the question of insanity, who have had transactions with the party alleged to be insane, and have known him for months immediately preceding the acts alleged to be irrational, may be asked whether they ever observed anything about him, or what he said or did, that indicated insanity.³

(d) A witness who was present when a will in controversy was executed, and who states fully the condition of the testatrix, and her appearance and conversation, may also be permitted to give her opinion as to the mental capacity of the testatrix at the time.⁴

(e) An expert may be asked whether there is any form of insanity known to the medical profession where the mind at fits comes, and then there is a blank and it goes. Such question calls for a fact, and is not of a nature making hypothesis necessary.⁵ So an expert witness as to the condition of a person's mind may testify directly what is insanity or what causes it, but must assume hypothetical facts when he states his conclusion.⁶ Hypothetical questions as to insanity may include any portion of the actual history of the case of which evidence has been given.⁷ But a question based in part on personal knowledge and partly on a hypothetical case is not allowable.⁸

(f) Where the issue is as to soundness or unsoundness of a person, an expert witness cannot state that the supposed lunatic had not mental strength to manage his estate or conduct the business connected with it, or that he was not possessed of testamentary capacity.⁹

Conn. 325; *Lynch v. Doran*, 95 Mich. 395; *Com. v. Buccieri*, 153 Pa. St. 535.

¹ *Prentiss v. Bates*, 93 Mich. 234.

² *Re Schneider*, 21 Wash. L. Rep. (D. C.) 323.

³ *State v. Maier*, 36 W. Va. 757.

⁴ *Brown v. Mitchell*, 75 Tex. 9.

⁵ *People v. Osmond*, 138 N. Y. 80; 51 N. Y. State Rep. 727.

⁶ *Price v. Richmond & D. R. Co.*, 38 S. C. 123.

⁷ *Prentiss v. Bates*, 93 Mich. 234.

⁸ *State v. Welson* (Mo.), 21 S. W. Rep. 443.

⁹ *Matter of Arnold*, 14 Hun, 525;

(g) An expert may, upon a hypothetical statement of facts, give his opinion as to "the usual and ordinary capacity for doing business" of such a man as a grantor in a deed whose mental capacity is in issue.¹ And an expert may state his opinion as to the sanity of a person based on his own knowledge and conversation with him.² He may be examined as to the nature and effect of disease, the effect of particular treatment, and generally as to insanity in its various indications and manifestations.³ But to allow any witness to state whether or not a testator had capacity to make a will or do any other act would be calling on the witness to pass upon the question in issue, leaving nothing for the court or jury.⁵ But it seems that he must have made a study of mental diseases.⁵

(h) The testimony of an expert as to the insanity of an accused, based upon testimony in the case assumed to be true, is competent, but inferences from facts proved are to be drawn by the jury.⁶ Thus the opinion or belief of a witness as to whether the accused comprehended the situation, and what was transpiring at or soon after the homicide, is incompetent on a trial for murder.⁷ But in *State v. Leehman*⁸ an expert was allowed to state whether or not the defendant knew moral good from evil and right from wrong. In Massachusetts ordinary witnesses, whatever their opportunities of observation, cannot give a mere opinion as to the mental condition of a party;⁹ and the opinion of an attesting witness to a will formed at another time, before or after the execution of the will, in respect to the testator's mental capacity, stands like that of any other witness and is not admissible.

Matter of Mason, 60 id. 46; 38 N. Y. State Rep. 533.

¹ Pool v. Dean, 153 Mass. 589.

² People v. Kemmler, 119 N. Y. 580; 30 N. Y. State Rep. 198; Taylor v. State, 83 Ga. 647.

³ State v. Meyers, 99 Mo. 107.

⁴ Re Blood's Estate (Vt.), 19 Atl. Rep. 770; Re McCarthy, 55 Hun, 71; 28 N. Y. State Rep. 342.

⁵ Hutchins v. Ford, 82 Me. 363.

⁶ People v. McElvaine, 30 N. Y. State Rep. 977; 121 N. Y. 250.

⁷ People v. Fish, 125 N. Y. 136; 34 N. Y. State Rep. 840; People v. Smiler, 35 N. Y. State Rep. 1; 125 N. Y. 717.

⁸ 49 N. W. Rep. 3 (S. D.).

⁹ Williams v. Spencer, 150 Mass. 346.

VII. MOTIVES, INTENT, THOUGHTS, RELIEF.

(1) As a general rule a witness cannot state his motives, intent, thoughts or belief, or those of another person. The motives and opinions of a witness who, for the purpose of showing knowledge by the employer as testified in an action by an employee for personal injuries from a defective shaft, that he notified the foreman of the defect, are admissible.¹ But the knowledge or intent with which an act is done, when material, may be proved by the direct testimony of the actors.² Thus, where it is material to know whether a grantor acted in good faith in making a deed, or the motives of the grantee, either may testify as to his intent in the transaction;³ and a party may testify that representations of the other party induced him to make the trade.⁴ But uncommunicated motive or intention of a party is a matter to be drawn from the facts and circumstances of the case, and is not the subject of direct proof.⁵

(2) It is competent to show by parol that by executing a second lease the landlord did not intend to declare the former lease forfeited.⁶ And upon a question of fact as to whether a sale was made for the purpose of hindering, delaying and defrauding his creditors, the seller may testify directly as to whether he in fact intended by the sale to hinder, delay or defraud his creditors.⁷ But no one can testify as to the intention of another.⁸

(3) In an action against a railroad company for the wrongful expulsion of the plaintiff by its conductor from its train, the conductor may testify whether he intended to expel the plaintiff, or was misunderstood in his direction which the plaintiff obeyed.⁹ In an action for enticing plaintiff's wife to

¹ *Kauffman v. Maier*, 94 Cal. 269; *Pridham v. Weddington*, 74 Tex. 354.
Alabama & G. S. R. Co. v. Hill, 93 Ala. 514; *Lewis v. State* (Ala.), 11 S. Rep. 259; *People v. Wright*, 93 Cal. 564; *Corker v. Corker* (Cal.), 30 Pac. Rep. 541.

² *Clark v. Marshall*, 62 N. H. 498; *Baldwin v. Walker*, 91 Ala. 428.

Glazer v. Mason, 24 Mo. App. 321. ⁶ *Thomas v. Hukill*, 34 W. Va. 385.

³ *Nixon v. McKinney*, 105 N. C. 23; *Angell v. Pickard*, 61 Mich. 561; ⁷ *Gordom v. Woodward*, 44 Kan. 758; *Wilson v. Clark*, 1 Ind. App. 182.

⁴ *Mann v. Taylor*, 78 Iowa, 355; ⁸ *Rindskopf v. Myers*, 77 Wis. 649; *Schmick v. Noel*, 72 Tex. 1.

⁵ *Georgia R. & B. Co. v. Eskew*, 86 Ga. 641.

⁹ *Drake v. State*, 29 Tex. App. 265.

leave him, the defendant may testify that he had no intention to bring about a separation.¹ In an action for surety of the peace the defendant may testify that he had no intention to hurt the complainant.² One sued for libel may state that he had no ill-will against the plaintiff, and had no other motive in making the publication than the public good;³ and officers of a corporation sued for libel may testify that they had not and did not know that any officer or employee had any hatred, ill-will or malicious intention toward the plaintiff in the publication of the alleged libel.⁴

(4) A witness can prove the fact of an understanding between parties as to the delivery of goods, although he is not able to testify to the terms.⁵

(5) A person, injured by the explosion of gunpowder in a hole in which he was drilling under the direction of the general manager of a stone-quarry, may testify that he believed that there was no danger after being so assured by the general manager;⁶ and a plaintiff in an action for injuries to himself and team, alleged to have resulted from a defective railing of a bridge, the defense being that he was guilty of contributory negligence in not jumping from the wagon when his team began backing, may testify that while the team was backing he looked around and saw the railing, and thought that it would be sufficiently strong to stop the team.⁷

(6) So a defendant in an action for malicious prosecution may testify that he was not prompted by ill-will and malice in prosecuting plaintiff on the charges made against him.⁸ A mortgagee may testify directly, when the validity of a chattel mortgage is in issue, what her intention was in taking the mortgage.⁹ And one indicted for aggravated assault in striking a boy with a switch has the right to testify in his own behalf as to his object and purpose in striking the boy, for the purpose of showing his motives and intent.¹⁰

¹ Tasker v. Stanley, 153 Mass. 148.

² Stratton v. Lockhart, 3 Ind. App. 380.

³ Hay v. Reid, 85 Mich. 296. But see Mowry v. Raabe, 89 Cal. 606.

⁴ Brown v. Massachusetts Title Ins. Co., 151 Mass. 127.

⁵ Webster v. Le Compte, 74 Md. 249.

⁶ Malcolm v. Fuller, 152 Mass. 160.

⁷ Baldridge, etc. Bridge Co. v. Cartrett, 75 Tex. 628.

⁸ McCormack v. Perry, 47 Hun, 71; 14 N. Y. State Rep. 154.

⁹ Gentry v. Kelly, 49 Kan. 82.

¹⁰ Berry v. State, 30 Tex. App. 423.

(7) Evidence that a person felt and exhibited mental anguish on account of the delay in delivering a telegram is admissible is an action where damages are allowable for such negligence.¹ A witness having knowledge may state whether or not parties were friendly;² or that the statements of a party were made voluntarily;³ or that witness expected to meet a person at a certain place.⁴

(8) In an action for negligence, plaintiff may state his reasons for returning from the street where he had been walking to the sidewalk where the accident occurred.⁵

(9) A master of a ship may testify in relation to his mate, "I had every reason to believe the man was sufficient for a coasting mate. I believed at the time he was capable."⁶ One of the makers of a note may state whether he signed it as principal or surety.⁷ In an action for slander in charging plaintiff with the commission of a certain crime, the defendant is entitled to testify in mitigation of damages that he did not intend to charge the plaintiff with the commission of such crime.⁸

(10) A party may testify that she had never parted with the possession of a deed with intent to pass the property purporting to be conveyed.⁹ Witnesses may give their understanding of alleged slanderous words spoken in their presence;¹⁰ and a witness may state what he understood from the language and conduct of a person, when such understanding is material to the issue.¹¹ A witness may testify that the reason he passed behind defendant, who is charged with murder, was that he expected deceased would strike at defendant with a billiard cue, and that he himself might get hit.¹²

¹ *Western Union Tel. Co. v. Adams*, 75 Tex. 531.

² *State v. James*, 31 S. C. 218.

³ *State v. Holden*, 42 Minn. 350.

⁴ *State v. Thompson*, 41 La. Ann. 1088.

⁵ *Fox v. Village of Fort Edward*, 48 Hun, 363; 16 N. Y. State Rep. 303; 121 N. Y. 666.

⁶ *Hutchins v. Ford*, 82 Me. 363.

⁷ *Druly v. Johnson*, 21 Ill. App. 267.

⁸ *Lally v. Emery*, 54 Hun, 517; 28 N. Y. State Rep. 127.

⁹ *Stevens v. Stevens*, 150 Mass. 557.

¹⁰ *Freeman v. Sanderson*, 123 Ind. 264; *People v. Moore*, 50 Hun, 356; 20 N. Y. State Rep. 1.

¹¹ *Fisks v. Gowing*, 61 N. H. 431.

¹² *Cochran v. State*, 28 Tex. App. 422.

VIII. OPINIONS AS TO LEGAL QUESTIONS.

A witness cannot answer a question simply calling for his conclusion as to the law upon the facts stated in the question.¹ But skilled attorneys of another state may state the law and practice of their courts.² A witness may testify that he never delivered possession of property;³ that he never purchased any goods from the seller;⁴ that services were not performed under the contract.⁵ But a witness cannot state that in carrying out a law some provision of the constitution may be violated;⁶ nor the construction and interpretation of a foreign statute;⁷ nor that certain persons are joint owners of land;⁸ nor that a certain person exercised acts of ownership or control over the property.⁹ But it is competent for a witness to state that a defendant in ejectment went into possession and thereafter controlled the land.¹⁰ And a statement by a witness that a certain person was in possession of land, made in its ordinary sense among laymen, is one of fact and not of a conclusion of law, in the absence of anything to indicate that such possession was a conflicting one.¹¹ But a witness cannot testify to his ownership of land when such ownership is in issue;¹² nor can he state from whom he purchased;¹³ nor can a witness in an action for services testify that he performed his part of the contract in full; nor that he had performed all the duties imposed upon him by the contract of employment.¹⁴ A witness may state that he is the owner of personal property; that he is in possession of real property.¹⁵ So a witness of the legal profession may state what the law of his own

¹ *McCanley v. Murphy*, 96 Ga. 475.

¹⁰ *Woodstock Iron Co. v. Roberts*,

² *Chattanooga R. etc. R. Co. v. Jackson*, 86 Ga. 676.

87 Ala. 436.

³ *Wallace v. Nodine*, 57 Hun, 239; 32 N. Y. State Rep. 657.

¹¹ *Bryan v. Spivey*, 109 N. C. 57.

⁴ *Sax v. Davis*, 81 Iowa, 692.

¹² *Benjamin v. Shea*, 83 Iowa, 392.

⁵ *Jamison v. Weaver*, 81 Iowa, 212.

¹³ *Burkholder v. Fonner*, 34 Neb. 1.

⁶ *Kemmler v. Durston*, 119 N. Y. 569; 30 N. Y. State Rep. 203.

¹⁴ *Clark v. Ryan* (Ala.), 11 S. Rep. 22; *Fisher v. Munroe*, 42 N. Y. State Rep. 118; *Holler v. Apa*, 43 id. 529; *Reynolds v. Lawton*, id. 578; 62 Hun, 596; *Cogeshall v. Pittsburgh Roller Mill Co.*, 48 Kan. 480.

⁷ *Molson's Bank v. Boordman*, 14 N. Y. State Rep. 658.

⁸ *Howard v. Zempelmann* (Tex.), 14 S. W. Rep. 59.

¹⁵ *Jackson v. Jackson* (Ala.), 12 S. Rep. 437; *Steed v. Knowles*, id. 75.

⁹ *Bunting v. Solz*, 84 Cal. 168.

state is, and whether it is statutory or unwritten law.¹ But whether a witness took possession of property in his individual capacity or as assignee is a mere conclusion, to which he cannot testify.² So the condition of the title to property sold and to be delivered, under a written contract, is a conclusion of law, to which a witness cannot testify.³

IX. PHYSICAL CONDITIONS.

(a) Non-expert witnesses are competent to testify to the condition and appearance of plaintiff, in an action for negligence, before the accident, and as to his having recovered from former injuries, as such matters are within the range of common observation.⁴ They may also state as to the condition of health or the pain suffered by a person injured, based upon personal observations while in attendance upon such person.⁵ They may testify as to the physical condition of plaintiff in an action for personal injuries in regard to health and strength.⁶ A woman may state that she knows nothing else which could have caused her illness except the exposure on which her husband's action for damages is based;⁷ and a witness may testify as to the permanent character of the injuries for which he is suing.⁸ So he may state from his observation the effect that an injury had upon the health of another person so far as it refers to the visible effects of the injury as manifested by physical exertions.⁹ So he may testify from his own knowledge as to the length, depth and direction of wounds;¹⁰ or that the injured party's neck "looked like it had been struck with a hot iron, and looked scarred."¹¹

(b) An expert may state as to the probable effects of a known injury, and the probable duration of the injurious ef-

¹ *Riendeau v. Vien*, 50 N. Y. State Rep. 309.

² *Boyle v. Williams*, 48 N. Y. State Rep. 651.

³ *Van Winkle v. Crowell*, 146 U. S. 42; *Steppe v. National Life & M. Ass'n*, 37 S. C. 417.

⁴ *Winter v. Central Iowa R. Co.* (Iowa), 45 N. W. Rep. 737.

⁵ *Shelby v. Claggett*, 46 Ohio St. 549; *Heddles v. Chicago & N. W. R. Co.* (Wis.), 46 N. W. Rep. 115.

⁶ *Stone v. More*, 83 Iowa, 186.

⁷ *Pullman Palace Car Co. v. Smith*, 79 Tex. 468.

⁸ *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45.

⁹ *Van Gent v. Chicago, M. & St. Paul R. Co.* (Iowa), 45 N. W. Rep. 913.

¹⁰ *Pittman v. State*, 25 Fla. 648.

¹¹ *Perry v. State*, 87 Ala. 30.

fects;¹ and he may state as to the length of time that a person suffering from disease may live, although stating that he can only give the probability from the history of other similar cases.² He may also state as to what may be the result of a disease in the natural and ordinary course;³ or the probable future effects of his injuries;⁴ or that the injuries are of a permanent character;⁵ or whether the same are of a class that are necessarily painful;⁶ or that the limb will not improve after the length of time that has elapsed since the injury; and that probably any rheumatic or other trouble will be centered in the injured limb;⁷ or whether or not the fact that such person had not recovered from an injury at the time of the trial would indicate that the injuries were permanent. And after making a *post-mortem* examination of the deceased, who came to his death from a blow, as to the direction from which the blow was delivered; that in cases of instantaneous death there is an involuntary and immediate rigidity of the muscles which would cause the hand to cling to the pistol, rendering it impossible for the deceased, if he were a suicide, to place the weapon between his legs after the shooting;⁸ and as to the probable effect of the continued use of intoxicating drinks in causing suicide;⁹ and that puerperal mania is a common mania at child-birth. They may state as to whether the autopsy upon the body of the deceased was properly made, with the requisite skill and care, and in the usual manner in which such things should be done;¹⁰ and whether one charged with bastardy was incapable, because of his age, of begetting the child;¹¹ or as to the cause of death;¹² and as to the amount of force requisite to drive the instrument with which the killing of a person was done

¹ Abbott v. Dwinnell, 75 Wis. 514.

⁷ Langworthy v. Green Tp., 88 Mich.

² Alberti v. New York, L. E. & W. R. Co., 118 N. Y. 77; 27 N. Y. State Rep. 865.

207.

⁸ Washburn v. National Accident Ass'n, 59 Hun, 585; 32 N. Y. State Rep. 34.

³ Magee v. Troy, 119 N. Y. 640; 16 N. Y. State Rep. 336.

⁹ Poffinbarger v. Smith, 27 Neb. 788.

⁴ Cunningham v. New York Central & H. R. R. Co., 49 Fed. Rep. 439.

¹⁰ State v. Moxley, 102 Mo. 374.

⁵ Schuler v. Third Ave. R. Co., 44 N. Y. State Rep. 774.

¹¹ Johnson v. Castle, '63 Vt. 452.

¹² Carthous v. State, 78 Wis. 560.

⁶ Lake Erie & W. R. Co. v. Wills, 39 Ill. App. 649.

through the part through which it passed;¹ or whether or not such injuries would be likely to result from the cause alleged;² or whether an abscess was caused by a bruise and fracture;³ or that a miscarriage is traceable to a certain injury received by the person suffering it;⁴ or whether pregnancy would probably result from the first intercourse, where the female had been ravished and the act accomplished against her will;⁵ or that there would have been some hemorrhage at the mouth and nose of the murdered man if the body had been moved;⁶ or that the muzzle of a gun must have been higher than the man who was shot; or as to whether a person could have made a certain wound upon himself by a knife held in his hand;⁷ that the cicatrice skin which resulted from personal injuries was less serviceable and more likely to receive injury than the natural skin;⁸ or whether or not the pain which the plaintiff testifies he has experienced seemingly in his amputated arm and hand, since amputation, was the necessary consequence of the condition produced by the crushing and severance of the arm alleged as negligence;⁹ and whether a cause which it is alleged existed would, in his opinion as a medical man, be sufficient to produce the physical condition claimed to have resulted from such cause;¹⁰ and on an issue whether paralysis was caused by a fall upon a defective sidewalk, or from a disease of long standing, an expert may, upon a hypothetical question, give his opinion upon the approximate cause of such paralysis;¹¹ and a physician's opinion as an expert, as to whether a man accustomed to the handling of morphine could have any conception as to how much a quarter or an eighth of a grain was, is competent on an issue

¹ *People v. Fish*, 125 N. Y. 136; 34 N. Y. State Rep. 840.

² *Texas C. R. Co. v. Burnett*, 80 Tex. 536.

³ *Stauter v. Manhattan R. Co.*, 127 N. Y. 661; 38 N. Y. State Rep. 162.

⁴ *Gibbons v. Phoenix*, 39 N. Y. State Rep. 658; *State v. Ginger*, 80 Iowa, 574.

⁵ *Young v. Johnson*, 123 N. Y. 226; 33 N. Y. State Rep. 486.

⁶ *State v. Merriman*, 34 S. C. 16.

⁷ *State v. Bradley*, 34 S. C. 136.

⁸ *Gulf Coast & S. F. R. Co. v. Harriet*, 80 Tex. 73.

⁹ *Kitchenbottom v. Delaware, Lackawanna & W. R. Co.*, 122 N. Y. 91; 33 N. Y. State Rep. 312.

¹⁰ *Griffith v. Utica & M. R. Co.*, 63 Hun, 626; 43 N. Y. State Rep. 835; *Lacas v. Detroit City R. Co.*, 92 Mich. 412; *Pennsylvania R. Co. v. Frund* (Ind. App.), 30 N. E. Rep. 1116.

¹¹ *Bowen v. Huntington*, 35 W. Va. 632; *Hunter v. State*, 30 Tex. App. 314.

whether an assured committed suicide by taking morphine, or took an overdose by accident in ignorance of the quantity that would produce death;¹ and a physician may state, in an action for personal injuries, as to what will be the duration of the life of a man of plaintiff's age, according to his knowledge of mortality tables.²

(c) The opinion of a medical expert who has testified to the course of the bullet which killed deceased is inadmissible to show the position of deceased's body at the time the wound was received;³ nor can an expert witness give his conclusion from the history of the case and hypothetical facts that an injury resulted from the fall testified to.⁴

(d) The opinion of a medical expert, based upon facts within his own knowledge and observation, as to the nature of the affection from which a party is suffering, and whether it was produced by violence or disease, has long been held to be competent. The cause or effect of a physical injury can frequently be proved in no other way than by the opinions of those specifically qualified by experience and study, based upon facts in evidence and either known to the witness or assumed to be true. The cases are numerous which hold that it is competent to show by the opinions of medical experts that an injury received was the cause of the condition of the person injured.⁵ Thus, a physician may be asked whether the physical condition in which he found a party upon his examination of him could have resulted from the accident complained of, and as to its permanence. The rule established by the cases of *Strohm v. N. Y., L. E. & W. R. Co.*⁶ and of *Tozer v. N. Y. C. & H. R. R. Co.*⁷ simply precludes the giving of evidence of future consequences which are contingent, speculative and merely possible as the basis of ascertaining damages. Those authorities in no wise conflict with the rule allowing evidence of physicians as to a party's present condition of bodily suffering or injuries, of their permanence

¹ *Mutual Life Ins. Co. v. Tillman*, 116 N. Y. 459; 27 N. Y. State Rep. 84 Tex. 31. 549; *Stauter v. Manhattan R. Co.*,

² *McCue v. Knoxville*, 146 Pa. St. 127 N. Y. 661; 38 N. Y. State Rep. 480. 162.

³ *Brown v. State*, 55 Ark. 593. ⁶ 96 N. Y. 305.

⁴ *Jones v. Portland*, 88 Mich. 598. ⁷ 105 N. Y. 617; 8 N. Y. State Rep.

⁵ *McClain v. Brooklyn City R. Co.*, 58.

and as to their cause. Such proof seems to be the best mode and manner of furnishing information for the guidance of the jury in awarding damages. Future consequences which are reasonably to be expected to follow an injury may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury, they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative or merely possible are not proper to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.¹ Thus, a medical expert having knowledge of a case may be asked as to the probability of a party's recovery from an injury or disease. It simply relates to the permanence of the injury. There is an obvious difference between an opinion as to the permanence of a disease or injury already existing, and capable of being examined and studied, and one as to the merely possible outbreak of new diseases or sufferings having their cause in the original injury. In the former case the disease or injury and its symptoms are present and existing, their indications are more or less plain and obvious, and from their severity or slightness a recovery may reasonably be expected or the contrary; while an opinion that some new or different complication will arise is merely a double speculation — one that it may possibly occur, and the other, that if it does, it will be a product of the original injury instead of some other new and perhaps unknown cause. Questions to a medical expert are not inadmissible because they seek the probabilities of a recovery. Certainty is impossible. Medicine is very far from being an exact science. At the best its diagnosis is little more than a guess enlightened by experience. The chances of recovery in a given case are more or less affected

¹ *Strohm v. N. Y., L. E. & W. R. Co.*, 96 N. Y. 305; *Butler v. Manhattan R. Co.*, 52 N. Y. State Rep. 498.

by unknown causes and unexpected contingencies; and the wisest physicians can do no more than form an opinion based upon a reasonable probability.¹

(e) Persons familiarly associated and coming in frequent contact with another may testify to his state of health, hearing, eyesight and ability to work and walk and use his limbs naturally, although not experts.²

(f) A plaintiff in an action for personal injuries may testify that he suffered pain and was confined to his bed in consequence.³

(g) While a physician, in an action for personal injuries, may testify to knowledge obtained of plaintiff's condition by professional examination and inquiries made for the purpose of treating him for the injuries, and may also state the conclusions at which he has arrived from knowledge gained by such examination and observation,⁴ a physician who examined a plaintiff, in an action for personal injuries, merely for the purpose of being sworn as an expert, cannot give an opinion based upon symptoms learned by questioning the plaintiff and from his declarations, and not observable by the physician himself.⁵ So a physician cannot give his opinion that plaintiff, in an action for personal injuries, is shamming.⁶

X. HANDWRITING.

It is a general rule of the common law that where a paper admitted or clearly proved to be genuine is already in evidence for some other purpose in a cause, and another paper, pertinent to the issue and alleged to be in the same handwriting, is offered in evidence, the jury may compare the latter with the former.⁷ And where a writing to be proved is of such antiquity that living witnesses cannot be had, and yet it is not old enough to prove itself, experts may compare it with

¹ *Griswold v. N. Y. C. & H. R. R. Co.*, 115 N. Y. 61; 23 N. Y. State Rep. 729.

² *Chicago City R. Co. v. Van Vleck*, 143 Ill. 480; *Lawson v. Conaway*, 37 W. Va. 159; *Price v. Richmond & D. R. Co.*, 38 S. C. 42.

³ *North Chicago St. R. Co. v. Cook*, 145 Ill. 551.

⁴ *Chicago, St. L. & P. R. Co. v. Spilker (Ind.)*, 33 N. E. Rep. 280.

⁵ *Abbot v. Heath*, 84 Wis. 314.

⁶ *Cole v. Lake Shore & M. S. R. Co.*, 95 Mich. 77.

⁷ *Moore v. United States*, 91 U. S. 270; *Ellis v. People*, 21 How. Pr. 356.

other documents admitted to be genuine or proved to have been respected, treated and acted upon as such by all parties, and may give their opinion concerning the genuineness of the writing in question.¹ And when a witness testifies to his opinion of the genuineness of a signature on a paper, it is competent on cross-examination to question him as to his opinion of the genuineness of the same party's signature to other papers which are in evidence.² In New York and many of the other states of the Union, statutory provisions have been made, that where the authenticity of the paper is directly the subject-matter of the issue, other papers the signatures to which are shown to be genuine may be introduced in evidence for the purpose of comparison with the paper in dispute. And a party is not limited to the genuine signatures introduced by his adversary for the purpose of comparison, but may put in evidence other genuine signatures, in order to afford as wide a range for comparison as may be practicable.³

In *People v. Murphy*⁴ the defendant was charged with arson. On the trial two anonymous letters were introduced in evidence, by adducing in evidence a number of specimens of defendant's genuine handwriting and calling expert witnesses to show by comparison of the letters with the specimens of writing shown to be genuine, that the letters were in the defendant's handwriting. On appeal from the judgment in that case the defendant objected that the mode of proof of defendant's handwriting was unauthorized; that it was not a case of disputed writing within the provision of the statute; that the statute was only intended to change the rules of evidence formerly in force, where the authenticity of the paper is directly the subject-matter of the issue to be tried, as in the case of the denial of the execution of a note or a deed or a will, or any other instrument relied upon as the foundation of an action or defense, and the language of Chief Justice Ruger in *Peck v. Callighan*⁵ was quoted, where it is said: "The disputed writing referred to in the statute relates only

¹ 1 Greenl. Ev., § 578; *Jackson v. Brooks*, 8 Wend. 626.

² *First Nat. Bank of Hornellsville v. Hyland*, 53 Hun, 108; 25 N. Y. State Rep. 446; 125 N. Y. 711.

³ *Mutual Life Ins. Co. v. Suiter*, 134 N. Y. 557; 42 N. Y. State Rep. 394.

⁴ 135 N. Y. 450; 48 N. Y. State Rep. 426.

⁵ 95 N. Y. 75.

to the instrument which is the subject of controversy in the action, and the specimens of handwriting admissible thereunder are those of the person purporting to have executed the instrument in controversy." In the former case, when the letters were offered in evidence, there was no objection to their reception on the ground that the proof of their genuineness was insufficient; but they were objected to solely on the ground that the letters themselves were incompetent and improper as evidence — an objection which pertains to the subject-matter of the proof offered and not to the method of its presentation or to any of the preliminary steps to be observed in its introduction. The main question raised was not passed upon because of the rule that: "Where evidence is not in its essential nature incompetent, all grounds of objection which might be obviated, if they had been specifically stated, will be deemed to have been waived." Upon the cross-examination of expert witnesses, upon the question of comparison of handwriting, the party so cross-examining them, for the purpose of testing the accuracy of their judgment, may submit to them different specimens of handwriting and ask them to compare them with the papers which they have testified were genuine or spurious, and to say whether, in their opinion, they were in the same handwriting. Such an examination serves as an impressive warning to the jury to closely scrutinize the expert evidence, because of the want of concurrence of judgment on the part of the witnesses, when they are required to compare the documents sworn to by them with specimens of whose authorship they are ignorant; and to that extent such a cross-examination is valuable and proper. But the party cross-examining cannot go farther and litigate the immaterial issue of the authenticity of the additional specimens submitted by him for such a purpose. He cannot prove that the specimens so presented by him for comparison were not in the handwriting of the party whom the experts testify the specimens were written by. It is a collateral matter, and a party cross-examining is bound by the replies of the witnesses to the questions put.¹ If it were allowed it would give rise to a multiplicity of collateral issues which might render the litigation interminable.

¹ *Hilsley v. Palmer*, 32 Hun, 472.

Where there is a question as to the person by whom any document is written or signed, the opinion of any person acquainted with the handwriting of the supposed writer that it was or was not written or signed by him is competent and is deemed to be a relevant fact. A person is deemed to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.¹

The general rule is that a party, the genuineness of whose signature is in dispute, cannot write his name in the presence of the court and jury and then give it in evidence in his own behalf for the jury to institute a comparison between it and the one in question. The party so situated would be under a great temptation to produce a signature in appearance altogether dissimilar to the one sought to be sustained by the adverse party as genuine.² But in *Chandler v. Le Barron*³ it was held that a writing made in the presence of court and jury, by the party whose signature is in dispute, may be submitted to the jury for the purpose of comparison. So in *Doe v. Wilson*⁴ the court say: "Their lordships have no doubt that if, on trial at *nisi prius*, the witness denies the signature to a document produced in evidence, and, upon being desired to write his name, has done so in open court, such writing might be treated as evidence in the case and be submitted to a jury, who may compare it with the alleged signature to the document." So in *Bronner v. Loomis*⁵ and *People v. De Kroft*⁶ the defendant, who interposed the defense of forgery upon her cross-examination, at the request of the plaintiff wrote her name on a slip of paper, which was received in evidence on the plaintiff's offer and over the defendant's objection, and it was held to be competent evidence. It was held to be com-

¹ *Johnson v. Daverne*, 19 Johns. 134; *Rogers v. Ritter*, 12 Wall. 317; *Doe v. Sackermore*, 5 A. & E. 705, 730, 739; *Reg. v. Horne Tooke*, 25 St. Tr. 71; *Stephen's Dig. Law of Ev.*, art. 51.

² *King v. Donohue*, 110 Mass. 155.

³ 45 Me. 534.

⁴ 10 Moore Priv. Coun. Cas. 502.

⁵ 14 Hun, 341.

⁶ 49 Hun, 71; 17 N. Y. State Rep. 208.

petent on the question of the witness' veracity. The testimony of an expert is admissible to show whether a certain paper is dated "Jany." or "July," whether a note has been altered from "eight" to "eighty," whether a figure is a "4" or "2," etc. If such comparison may be made by unskilled jurymen, why should they not be aided and enlightened, as they may be in analogous cases of the genuineness of handwriting, alterations and simulations, by men who have made the subject of handwriting a study and have obtained skill and proficiency in that branch of knowledge. If we analyze the practical processes which have to be gone through with in order to elicit and apply this kind of evidence, whether from expert or lay witnesses, we shall find that the witness is required to examine and determine what the letters and characters, or even hieroglyphics, are, and what word they form in combination.¹ So the rule may be regarded as well settled that the meaning of characters, marks, letters, figures, words or phrases used in contracts having a purely local or technical meaning, unintelligible to persons unacquainted with the business, may be given and explained by parol evidence, if the explanation is consistent with the terms of the contract.² And the rule that excludes oral testimony to contradict or vary the terms of a written instrument is directed against evidence that would add other words to it, or substitute other words in its stead, and does not apply where there is any uncertainty as to the object or extent of the engagement of the parties, or where the meaning of the terms employed is technical. Verbal testimony must be resorted to to ascertain the nature of the subject to which an instrument refers. Thus, when a contract simply provides that the contractor shall furnish all materials and labor for plumbing and gas-fitting, evidence of experts as to whether the furnishing and setting up of ranges was included in it is admissible, and evidence that it was distinctly agreed that the contractor was not to furnish the ranges is admissible.³

¹ Sheldon v. Benham, 4 Hill, 129; ² Atkinson v. Truesdall, 127 N. Y. Armstrong v. Burrows, 6 Watts, 230.

266; Vinton v. Peck, 14 Mich. 287; ³ Cassidy v. Fonham, 38 N. Y. Stone v. Hubbard, 61 Mass. 595; State Rep. 177.

Dresler v. Hard et al., 127 N. Y. 235;
38 N. Y. State Rep. 147.

Experts who have never seen the party write are not limited in their statements to the characteristics of the several writings, their resemblance or dissimilarity, but may be permitted to state whether the disputed signature was genuine or not.¹ A writing introduced in evidence for the purpose of comparison need not be proved by direct evidence, but may be proved like any other writing.² Upon the examination of an expert in handwriting as to the genuineness of a disputed signature, it is proper to permit him to illustrate upon a black-board the differences between the disputed and genuine signatures, and to explain the characteristics of the handwriting.³ Knowledge of his decedent's signature, gained by an administrator by examination of checks, notes and papers found among the former's papers, qualifies him to testify whether the signature in suit is that of the decedent.⁴

XI. APPEARANCE, IDENTITY, AGE, QUALITY.

(1) Any person may testify, from what he saw, his opinion that a person was intoxicated and how far he was affected by the intoxication.⁵ Any intelligent witness, having knowledge of an injured person's appearance immediately after the accident, is competent to testify in that regard;⁶ and a witness may give his opinion that a depression in a bed which he had seen and examined was made by a person's head.⁷ So a witness may give his opinion that a large stain seen by him upon bed-clothing was the stain left by a pool of blood; and that blood seen by him upon the coat of one indicted for robbery shortly after the crime was fresh.⁸ So an expert witness may testify whether ice lying on or near a railroad track appeared to have been struck by an engine or cars.⁹ So a witness may state that "there were defects in" a sidewalk.¹⁰

¹ *Peck v. Callaghan*, 95 N. Y. 73; *lory v. Ohio Farmers' Ins. Co.*, 90 Sudlaw v. Warshing, 108 N. Y. 520; Mich. 112.

Miles v. Loomis, 75 N. Y. 288; *Haddock v. O'Rourke*, 6 N. Y. Supp. 549.

² *McKay v. Lasher*, 121 N. Y. 477; 19 N. Y. State Rep. 815.

³ *Dyer v. Brown*, 23 N. Y. State Rep. 695; 52 Hun, 321.

⁴ *Tucker v. Kellogg*, 8 Utah, 11; *Berg v. Peterson*, 49 Minn. 420; Mal-

⁵ *People v. McLean*, 59 Hun, 626; 37 N. Y. State Rep. 628.

⁶ *James v. Ford*, 30 N. Y. State Rep. 687.

⁷ *State v. Welch*, 36 W. Va. 690.

⁸ *People v. Loui Tong*, 90 Cal. 377.

⁹ *Scagle v. Chicago, M. & St. Paul R. Co.*, 83 Iowa, 380.

¹⁰ *Elkhart v. Witman*, 122 Ind. 538.

(2) An experienced civil engineer may testify as an expert that stakes, each having a nail in the top, found near his survey line, are surveyors' stakes.¹

(3) Testimony as to whether the light at an elevator opening was sufficient to enable it to be readily seen, given by persons who have tested it under the same conditions as when the accident happened, was allowed in *Snyder v. Witner*;² and in *St. Louis, A. & T. R. Co. v. Johnson*,³ opinions of experts were admitted to establish the readiness with which sand could have been seen on a railroad track at a point where a train was derailed, and the chances of stopping a train after the sand had been seen. In *Chicago & A. R. Co. v. Legg*⁴ a witness was allowed to state that in his judgment, from the appearance of the tracks and the indications he saw, animals killed by a railway were running at a given point. In *Williams v. State*⁵ a witness, after stating the facts, was allowed to state his conclusions of the appearance and acts of one accused of crime.

(4) Testimony of witnesses as to their impressions or opinions as to the appearance or expression of countenance of one accused of murder just after the affray is admissible.⁶ So is evidence of the appearance of deceased at the time of the injury causing death in respect to intoxication and his ability to take care of himself.⁷ So a witness familiar with shot-guns and Winchesters may state that a human body was in an advanced state of decomposition, and that wounds thereon had the appearance of being made with a shot-gun and a bullet from a Winchester rifle.⁸

(5) A witness may state that a photograph is a correct representation of a railroad crossing.⁹ A non-expert cannot give his opinion on the question of age;¹⁰ but in a prosecution for selling liquor to minors, testimony of a witness as to the effect their physical appearance produced on the mind of the witness as to the ages of the minors is competent.¹¹ Evidence that

¹ *McGinnis v. Hamilton*, 58 Conn. 69.

² 82 Iowa, 652.

³ 78 Tex. 536.

⁴ 32 Ill. App. 218.

⁵ 16 S. W. Rep. (Ark.) 816.

⁶ *State v. Buckler*, 103 Mo. 203.

⁷ *Cook v. Standard L. & Acc. Ins.* 561.

⁸ *Morris v. State*, 30 Tex. App. 95.

⁹ *Miller v. Louisville, N. A. etc. R. Co.*, 128 Ind. 97; *Travellers' Ins. Co. v. Sheppard*, 85 Ga. 751.

¹⁰ *Morton v. State*, 90 Ala. 602.

¹¹ *Graham v. State*, 28 Tex. App.

Co., 84 Mich. 12.

when defendant under indictment for homicide was carried into the presence of a wounded man after the arrest the latter identified him as the one by whom he was shot is admissible under the rule that, when the opinion of the witness is the mere short-hand rendering of the facts, such opinion can be given, subject to cross-examination, as to the facts on which it is based.¹ So the opinions of witnesses are competent to show that hair found on a fence was from a horse which defendant, charged with robbery, was seen riding on the night of the crime,² and that witness examined the foot-prints around the place of the crime, and the defendant's boots, and that the tracks corresponded with the said boots.³ But a witness cannot testify that, in his opinion, certain tracks were made by defendant, as it is for the jury to determine from the facts whether they were or not.⁴ So a witness cannot state as to whether a written instrument had been executed at a recent or remote time, when based only on the appearance of the instrument;⁵ nor that a cartridge had marks on it indicating that it had been in the chambers of a pistol.⁶ Evidence that a person is commonly known by the name by which he is called in a suit is competent on the question of variance.⁷ So any fact or circumstance is admissible in evidence to identify a defendant notwithstanding its remoteness.⁸ It may be shown that a pair of drawers worn by defendant when arrested is similar to one of two pairs of a particular make and pattern which were in a box, and one of which was stolen and the other left at the time of a burglary of which the defendant is charged;⁹ and a witness in whose possession one of the stolen articles was found may describe the man of whom she purchased it, and state what he said to her at that time, where the prosecution claims that the seller and the accused are one.¹⁰ Dates of book entries not relating to the suit may be testified to by a witness who made them for the purpose of fixing the dates of entries relating to the suit by their relative positions.¹¹

¹ Fulcher v. State, 28 Tex. App. 465.

² Crumes v. State, 28 Tex. App. 516.

³ Clark v. State, 28 Tex. App. 189.

⁴ Riley v. State, 88 Ala. 193.

⁵ Williams v. Clark, 47 Minn. 53.

⁶ People v. Mitchell, 94 Cal. 550.

⁷ Com. v. Gould, 158 Mass. 499.

⁸ State v. Chambers, 45 La. Ann. 36; People v. Beach, 93 Mich. 25.

⁹ Woodruff v. State (Tex.), 20 N. W. Rep. 573.

¹⁰ Ryan v. State, 83 Wis. 486.

¹¹ Continental Ins. Co. v. Insurance Co. of Pa., 51 Fed. Rep. 884.

XII. LOCATION, LANGUAGE.

A surveyor cannot state as an opinion whether or not a certain boundary was located by a previous government survey before the land was surveyed by himself.¹ But he may state that a corner found by him in a survey of lands in dispute corresponded with other corners on the ground that were called for.² A surveyor cannot be allowed to fix private rights or lines by any theory of his own; but before his evidence can be received it must be connected with the starting points and other places or lines called for by the grants under which the parties claim;³ and a surveyor's testimony, as a man of science, is never receivable except in connection with the data from which he surveys; and lines run by him are of no value unless the data are distinctly established from which they are run. A witness with special means of knowledge may testify that the letters R. L. D., in a record of special internal revenue taxes, stand for "retail liquor dealer."⁴ So he may state what the words "New York Harbor" in a marine policy indicate to an insurer where the terms of the policy leave that in doubt.⁵ So a person who has qualified himself as an expert in the transactions of policy players may testify as to the meaning of the term "hit list" found on policy papers.⁶ So owners and masters of ships may testify to the usage and meaning in a commercial sense of clauses of a marine insurance policy relating to the course of the vessel insured.⁷ So evidence is admissible to show what meaning apparently ambiguous words and figures on tobacco tags conveyed to the trade.⁸ So experts may state whether the term "mason-work" in a contract includes the laying of inlet suction and drain pipes.⁹ So in an action for libel for publishing an article in which the name was misspelled, but as spelled was very similar in sound to that of the plaintiff, the testimony of persons who read the article is admissible to show that they understood it to mean the plaintiff.¹⁰

¹ Burt v. Bush, 82 Mich. 506.

⁷ Gerow v. Providence Wash. Ins. Co., 28 N. Y. 435.

² Boydston v. Sumpter, 78 Tex. 402.

³ Jones v. Lee, 77 Mich. 35.

⁸ Conestoga Cigar Co. v. Finke, 144 Pa. St. 159.

⁴ State v. O'Connell, 82 Me. 30.

⁵ Petrie v. Phoenix Ins. Co., 132 N. Y. 137; 32 N. Y. State Rep. 965.

⁹ Elgin v. Joslyn, 36 Ill. App. 301; Highton v. Dessau, 46 N. Y. State Rep. 922.

⁶ United States v. King (D. C.), 20 Wash. L. P. 507.

¹⁰ Farrand v. Aldrich, 85 Mich. 593.

XIII. MISCELLANEOUS.

Expert testimony is admissible as to the breeding and pedigree of horses.¹ A party may state that one who hired and discharged him was "boss" and that another was the superintendent.² Experts may state whether ranges are material for plumbing where the contract in question is silent on the subject.³ A grantor may state that the grantee was to pay the full value of the land by canceling and assuming certain debts, specifying them.⁴ A witness, after testifying that he did not hear a whistle or bell upon a locomotive, may also testify that there was nothing to prevent his hearing them.⁵ But he cannot testify that he could have heard a signal if it had been given.⁶ An expert may testify as to a defect in a particular elevator;⁷ or whether certain described phenomena were indicative of an "explosion" in the ordinary meaning of the term.⁸ Any witness may state that certain persons were in the habit of getting drunk.⁹ Whether gates, flaps or other appliances can be used to prevent influx of water from a drain into a cellar, and, if so, whether they will work satisfactorily, and it will be easy or difficult to put them in, are matters for experts.¹⁰ In *Carter v. Carter*¹¹ the witness was allowed to testify that, from sounds and words heard by him from an adjoining room in a hotel, he was of the opinion that an act of adultery was committed in such room. An employee in an action against the railroad company for injuries may testify as to his duties, though they may be prescribed by the company.¹² A witness cannot testify what would have been the result of a railroad ticket extended in a certain manner as to time;¹³ nor as to what he would have done if he had known that the movement by which

¹ *Fleming v. McClaffin*, 1 Ind. App. 587.

² *Applebee v. Albany Brew. Co.*, 58 Hun, 605; 34 N. Y. State Rep. 671.

³ *Cassidy v. Fonham*, 38 N. Y. State Rep. 177.

⁴ *McCormick v. Smith*, 127 Ind. 230.

⁵ *Ensley R. Co. v. Chewing*, 93 Ala. 24.

⁶ *Eskridge v. Cincinnati, N. O. & T. P. R. Co. (Ky.)*, 12 S. W. Rep. 580.

⁷ *Bier v. Standard Mfg. Co.*, 130 Pa. St. 446.

⁸ *St. Louis Gas Light Co. v. American Fire Ins. Co.*, 33 Mo. App. 348.

⁹ *Gallagher v. People*, 29 Ill. App. 401.

¹⁰ *Stead v. Worcester*, 150 Mass. 241.
¹¹ 37 Ill. App. 209.

¹² *Wabash W. R. Co. v. Morgan (Ind.)*, 31 N. E. Rep. 661.

¹³ *Spellman v. Richmond & D. R. Co.*, 35 S. C. 475.

he was injured was going to occur;¹ nor as to what would be the best use of premises in the absence of a railroad, and what its best available use in its present situation;² nor can a surveyor state whether a survey was actually located on the ground, or was an "office survey," that being a question for the determination of the jury from all the facts in evidence.³

XIV. OPINIONS OF NON-EXPERTS.

A non-expert may state whether or not a bust is a good likeness of a person with whom he is well acquainted.⁴ Such witnesses may be asked whether a party "appeared to be mad or in fun."⁵ Such witnesses may also state that a person accused of a crime appeared worried,⁶ or intoxicated, and after describing the appearance of a person may give their opinion as to his age.⁷ Witnesses cannot state their opinions that tracks seen in one place were the same and made by the same persons as others which they saw elsewhere, or that the track or impression made by a shoe taken from defendant's foot was the same as other tracks made and seen several days previous near a certain place.⁸

¹ Rutledge v. Missouri Pac. R. Co. (Mo.), 19 S. W. Rep. 38.

² Gray v. Manhattan R. Co., 128 N. Y. 499; 40 N. Y. State Rep. 478.

³ Reast v. Donald (Tex.), 19 S. W. Rep. 795.

⁴ Schwartz v. Wood, 67 Hun, 648; 51 N. Y. State Rep. 4.

⁵ State v. Edwards, 112 N. C. 901.

⁶ State v. Bradley, 64 Vt. 466.

⁷ State v. Douglass, 48 Mo. App. 39.

⁸ Hodge v. State (Ala.), 12 S. Rep. 164.

CHAPTER XVI.

PRESUMPTIVE EVIDENCE.

<p>I. OF PRESUMPTIVE EVIDENCE IN GENERAL.</p> <p>§ 1. Definition.</p> <p>2. Presumptions in general.</p> <p>3. Circumstances and presumptions of—Difference between.</p> <p>4. Presumptions <i>juris et de jure</i>.</p> <p>5. No arbitrary rule of presumption fixed.</p> <p>6. Circumstances inflexible proof when.</p> <p>7. Everyone is presumed to know the law when.</p> <p>8. Estoppels as presumptions.</p> <p>II. PRESUMPTIONS THAT OFFICERS DO THEIR DUTY.</p> <p>9. Public officers.</p> <p>10. Concerning person's <i>status</i>.</p> <p>11. A party presumed to know the contents of a writing signed by him.</p> <p>III. INTEREST OF HUSBAND AND WIFE.</p> <p>IV. A PARTY MUST SHOW A FACT OF WHICH HE IS BEST COGNIZANT.</p>	<p>V. PRESUMPTION OF JURISDICTION OF COURT.</p> <p>§ 12. General jurisdiction.</p> <p>13. Regularity of proceedings presumed when.</p> <p>14. Limited jurisdiction — Courts of.</p> <p>VI. PRESUMPTION AS TO CARRIERS, BAILEES, ETC.</p> <p>15. Negligence of.</p> <p>16. In an accident case.</p> <p>17. By tugs, ships, etc.</p> <p>18. By carriers as to passengers.</p> <p>19. Contributory negligence.</p> <p>20. As to property.</p> <p>21. By railroad trains.</p> <p>VII. OFFICIAL ACTS — PRESUMPTION OF AUTHORITY.</p> <p>22. Proof of official capacity.</p> <p>VIII. PRESUMPTION THAT THE USUAL COURSE OF BUSINESS WAS FOLLOWED.</p> <p>IX. AGREEMENT TO PAY FOR SERVICES PRESUMED WHEN.</p>
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I. OF PRESUMPTIVE EVIDENCE IN GENERAL.

§ 1. **Definition.**— A presumption is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inferences is disproved.¹ Presumptions are raised to take the place of actual proofs; when the proofs are present there is neither foundation nor room for the presumptions.² And inferences cannot be drawn from inferences to

¹ Starkie Ev. 23-39; Hull v. Arlington I. S. D., 82 Iowa, 692.

² Keller v. Ford (Pa.), 20 Atl. Rep.

show a liability.¹ A presumption of law is a rule of law that a particular inference shall be drawn by a court or jury from a particular circumstance.² A presumption of fact is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved. A presumption must be based upon a fact and not upon inference or upon another presumption.³ A presumption is neither continuous nor retroactive.⁴ As a rule, the burden of proof remains where the issue made by the pleadings places it.⁵

§ 2. **Presumptions in general.**—The results of experience are, expressly or impliedly, assumed as the standard of credibility in all questions dependent upon moral evidence.⁶ By experience, facts or events of the same character are referred to causes of the same kind. By analogy, facts and events similar in some but not in all their particulars to other facts and occurrences are concluded to have been produced by a similar cause; so that analogy vastly exceeds in its range the limits of experience in its widest latitude, though their boundaries may sometimes be coincident and sometimes indistinguishable. It has been profoundly remarked that in whatever manner the province of experience, strictly so called, comes to be thus enlarged, it is perfectly manifest that, without such provision for this purpose, the principles of our constitution would not have been duly adjusted to the scene in which we have to act. Were we not so formed as eagerly to seize the resembling features of different things and different events, and to extend our conclusions from the individual to the species, life would elapse before we had acquired the first rudiments of that knowledge which is essential to our animal existence. Every branch of knowledge presents instructive examples of the extent to which this mode of reasoning may be securely carried. In short, all that men know is referable to perception and reflection. During the period of childhood we believe implicitly almost all that is told us. At an early period, however, we begin to find that of the things told to us some

¹ Whitney v. Short, 149 Pa. St. 29.

² 1 Phil. Ev. 627.

³ Cumberland & P. R. Co. v. State, 73 Md. 74.

⁴ 1 Phil. Ev. 495; Lawson, Pres. Ev. 31.

⁵ Blunt v. Barrett, 124 N. Y. 117; 35 N. Y. State Rep. 64.

⁶ Whitney v. Short, 149 Pa. St. 29.

are not true, and thus our implicit reliance on the testimony of others is weakened.

§ 3. **Circumstances and presumptions — Difference between.**—The term “presumptive” is frequently used as synonymous with “circumstantial” evidence; but it is not so used with strict accuracy. The word “presumption,” *ex vi termini*, imports an inference from facts, and the adjunct “presumptive,” as applied to evidentiary facts, implies the certainty of some relation between the facts and the inference. Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent and not real; and even when the connection is real the deduction may be erroneous. Circumstantial and presumptive evidence differ, therefore, as genus and species. The antecedent circumstances are one thing, the presumption from them another and different one. Of presumptions afforded by moral phenomena, a memorable instance is recorded in the judgment of Solomon, whose knowledge of the all-powerful force of maternal love supplied him with an infallible criterion of truth.¹

§ 4. **Presumption juris et de jure.**—Conclusive, or, as they sometimes called, imperative or absolute, presumptions of law are rules determining the quantity of evidence requisite to support any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise; as that every person is conclusively presumed to contemplate the natural and probable consequences of his acts, and that every person above the age of fourteen years is acquainted with the law. The civilians divided legal presumptions into two classes, namely, *præsumptiones juris et de jure*, and *præsumptiones juris* simply. Presumptions of the former class were such as were considered to be founded upon a connection and relation so intimate and certain between the fact known and the fact sought that the latter was deemed to be an infallible consequence from the existence of the first. Such presumptions were called *præsumptiones juris*, because their force and authority were recognized by the law, and *de jure*, because they were made the foundation of certain specific legal conse-

¹ Domat's Civil Law, book III, tit. 6.

quences, against which no argument or evidence was admissible; while *præsumptiones juris* simply, though deduced from facts characteristic of truth, were always subject to be overthrown by proof of facts leading to a contrary presumption. The justice and policy of such relations have been thus eloquently stated. Civil cases regard property as natural; although property itself is not, yet almost everything concerning property, and all its modifications, is of artificial contrivance. The rules concerning it become more positive as connected with private institutions. The legislator, therefore, always, the jurist frequently, may obtain certain methods, by which alone they will suffer such matters to be known and established; because their very essence, for the greater part, depends on the arbitrary conventions of men. Men act on them with all the power of a creator over his creatures. They make fictions of law and presumptions of law *præsumptiones juris et de jure*, according to their ideas of utility, and against those fictions and against presumptions so created they do and may reject all evidence.

§ 5. **No arbitrary rule of presumption fixed.**—Presumptions of every kind, to be just, must be dictated by nature and reason; and, except under special and peculiar circumstances, it is impossible, without a dereliction of every rational principle, to lay down positive rules of presumption where every case must of necessity be connected with peculiarities of personal disposition and of concomitant circumstances, and be therefore irreducible to any fixed principle. In criminal jurisprudence, therefore, arbitrary presumptions should be sparingly admitted, and even when they are so they occasionally work injustice. Where a peremptory presumption of legal guilt is not pernicious and unjust, it is in general at least unnecessary; for, if it be a fair conclusion of the reason, it will be adopted by the tribunals without the mandate of the legislature. The law of England admits of no such thing as the *semiplena probatio*, founded on circumstances of conjecture and suspicion only, which in many countries governed by the Roman law was held to warrant the infliction of torture with a view to compel admissions and complete perfect proof.

§ 6. **Circumstances inflexible proof when.**—It has been said that “circumstances are inflexible proofs; that witnesses may

be mistaken or corrupted, but things can be neither.”¹ Now a circumstance is neither more nor less than a minor fact, and it may be admitted of all facts that they cannot lie; for a fact cannot at the same time exist and not exist; so that in truth the doctrine is merely the expression of a truism, that a fact is a fact. It may also be admitted that “circumstances are inflexible proofs,” but assuredly of nothing more than of their own existence. Although “circumstances cannot lie,” the narrators of them may; that, like witnesses of all other facts, they may be biased or mistaken, and that the facts, even if undisputably true, may lead to erroneous inferences. If evidence be so strong as necessarily to produce certainty and conviction, it matters not by what kind of evidence the effect is produced; and the intensity of the proof must be precisely the same whether the existence be direct or circumstantial. It is not intended to deny that circumstantial evidence affords a safe and satisfactory ground of assurance and belief, nor that in many individual instances it may be superior in proving power to other individual cases of proof by direct evidence. Where circumstances connect themselves closely with each other, where they form a large and strong body, so as to carry conviction to the minds of a jury, it may be proof of a more satisfactory sort than that which is direct. In some lamentable instances it has been known that a short story has been learned by heart by two or three witnesses; they have been consistent with themselves; they have been consistent with each other, swearing positively to a fact, which fact has turned out afterwards not to be true. It is almost impossible for a variety of witnesses, speaking to a variety of circumstances, so to concert a story as to impose upon a jury by a fabrication of that sort; so that where it is cogent, strong, and powerful, where the witnesses do not contradict each other, or do not contradict themselves, it may be evidence more satisfactory than even direct evidence, and there are more instances than one where that has been the case. It has been said that “though in most cases of circumstantial evidence there be a possibility that the prisoner may be innocent, the same often holds in cases of direct proof, where witnesses may err as to identity of person, or corruptly falsify,

¹ Burnett's C. L. of Scotland, 520.

for reasons that are at the time unknown.¹ Where the evidence is direct, the testimony credible, belief is the immediate and necessary result; whereas, in cases of circumstantial evidence, processes of inference and deduction are essentially involved, frequently of a most delicate and perplexing character, liable to numerous causes of fallacy, some of them inherent in the nature of the mind itself, which has been profoundly compared to the distorting power of an uneven mirror, imparting its own nature upon the true nature of things.²

§ 7. Every one is presumed to know the law when.—*"Ignorantia juris, quod quisque tenetur scire, neminem excusat,"* is a maxim of law recognized from the earliest times. Every one who is of the age of discretion and *compos mentis* is presumed to know the municipal law when ignorance of it would relieve him from the consequences of a crime or from liability upon a contract; for every one is bound to know the law of the land regulating his conduct, and he is presumed to do so.³ Thus, where A. deals with a person whom he knows to be a broker, he is presumed to know that such person is acting as an agent for some third person.⁴ And where A. finds a mortgage on record over thirty years old, which the law from lapse of time presumes paid, if A. purchases the mortgage he is presumed to know that it is presumed to be paid.⁵ And in a case where A. is sentenced to the penitentiary by a court having no jurisdiction to try him, in an action against the jailer and sheriff for trespass it is presumed that they knew the law and that they had no right to hold him.⁶ It is an offense to sell an article the sale of which is prohibited, although the seller does not know that it is a prohibited article.⁷ Thus, where a statute prohibits the selling of liquor to an intoxicated person, if A. sells liquor to an intoxicated person, not being aware of the law, he is neverthe-

¹ Burnett on C. L. of Scotland, 524.

⁴ Baxter v. Duree, 50 Am. Dec. 602;

² Novum Organum, lib. 1, Aph. 41, 43; Best on Presumptions, 255. And see 3 Bentham's Jud. Ev., b. V, ch. XV, § IV.

29 Me. 434.

⁵ Goodwyn v. Baldwin, 59 Ala. 127.

⁶ Pattison v. Prior, 18 Ind. 440.

⁷ Com. v. Raymond, 97 Mass. 567;

³ 4 Bl. Comm. 27; 1 Hale, P. C. 42.

Com. v. Wentworth, 118 id. 470.

less liable, as he is presumed to know it.¹ So where an act prohibited by statute is done without knowledge of the criminal ingredient in the act, ignorance or mistake of the fact has been held to have been no excuse;² but the contrary has also been held.³ There is no presumption of knowledge of private or foreign laws.

§ 8. **Estoppels as presumptions.**—Estoppels are ranked with conclusive presumptions, and are divided into three classes: estoppels by deed, by record, and *in pais*. A man is said to be estopped when he has done or permitted some act which the policy of the law will not permit him to gainsay or deny. They are only binding upon the parties and their privies, and can only be taken advantage of by those who are bound by them. But it does apply to the sovereign. Estoppels *in pais* are those which are not included in those by deed or record. Thus, if the maker of a note declares it to be good to a person who is about to purchase it, or stands by in silence when it is about to be transferred to a third person, he is thereby estopped from setting up any defense to the note which existed at that time of which he was or ought to have been cognizant.⁴ Mr. Lawson, in his work on Presumptive Evidence, says:⁵ Persons engaged in a particular trade are presumed to be acquainted with the value of an article bought and sold therein, the names under which they go in such trade, and the general customs obtaining and followed therein. The same rule is laid down in *Hinckley v. Kersting*,⁶ where it was held that a bank was estopped from saying that bank bills purchased by it at a discount were worthless. A person who deals in a particular market must be taken to deal according to the custom of that market.⁷ All trades have their usages, and when a contract is made with a man about the business of his craft, it is presumed to have been made on the basis of such usage, which becomes a part of it. In other words, the uniform custom of a merchant or manufacturer is

¹ *Com. v. Boynton*, 2 Allen (Mass.), 160; *Whilton v. State*, 37 Miss. 379; *Winchart v. State*, 6 Ind. 30.

² *Com. v. Emmons*, 98 Mass. 6.

³ *Cutter v. State*, 36 N. J. L. 125; *Stern v. State*, 53 Ga. 229.

⁴ *Cloud v. Whiting*, 38 Ala. 57; *Vanderpool v. Blake*, 28 Ind. 130.

⁵ Page 15.

⁶ 21 Ill. 247.

⁷ *Broom's Legal Max.* 682, 889.

presumed to be known to those in the habit of dealing with him, and in their dealings they are presumed to act in reference to that custom. Thus, where it is the general custom in a certain trade to charge interest on accounts after a fixed time, parties dealing therein are presumed to be cognizant of this custom and are bound to it.¹

II. PRESUMPTION THAT OFFICERS DO THEIR DUTY.

§ 9. **Public officers.**—The presumption is that public officers do as the law and their duty require them.² The same presumption arises in favor of an attorney at law; and if an attorney does an act which would be a violation of his duty unless a certain condition had first been performed, it will be presumed that such condition was performed.³ But this presumption will not be permitted to sustain a vital jurisdictional fact;⁴ nor to sustain acts done by him outside of or contrary to the usual and well-recognized functions and duties of his office.⁵ Thus, where a return of service of a summons of an officer is not dated, the presumption is that it was served within the legal time.⁶ Where it is the duty of an officer to make certain entries in books, and the books with such entries are produced, the presumption is that he made them.⁷

§ 10. **Concerning person's status.**—The place where a person lives is presumptively his domicile.⁸ So the earnings of a minor son are presumed to belong to his father.⁹ Although the legal presumption, in the absence of an express agreement to the contrary, is that one who during his minority performs services for another standing *in loco parentis*

¹ Meech v. Smith, 7 Wend. 315.

² State v. Lewis, 107 N. C. 967; Cowles v. Reavis, 109 id. 417; People ex rel. Soer v. Crane, 125 N. Y. 535; 35 N. Y. State Rep. 819; Young v. Wempe, 46 Fed. Rep. 354; Enos v. State, 131 Ind. 560; McDonald v. Nelson, 2 Cow. 139; People v. Smith, 59 Cal. 365; Roberts v. Cook, 68 Ga. 325; Conwell v. Watkins, 71 Ill. 489; Ward v. State, 48 Ind. 290; Tunstall v. Parish of Madison, 30 La. Ann. 471; Gay v. Southworth, 113 Mass.

333; Henry v. Dulle, 74 Mo. 413;

People v. Snyder, 41 N. Y. 397; Leedom v. Lombart, 80 Pa. St. 381.

³ Davis v. Bowe, 27 N. Y. State Rep. 862.

⁴ Sheldon v. Wright, 7 Barb. 39.

⁵ Jones v. Minibach, 26 Tex. 235.

⁶ Reid v. Jordan, 56 Ga. 62; Bennett v. McConnell, 88 id. 177.

⁷ Boyce v. Auditor-General, 90 Mich. 326.

⁸ Mowry v. Latham, 17 R. I. 480.

⁹ Grant v. Grant, 109 N. C. 710.

towards him is not entitled to compensation therefor,¹ there is no presumption of law against an agreement of a parent to pay a child for personal services, where there is evidence tending to show such an agreement, although if there is no such evidence there is a presumption that the services are gratuitous.² So the presumption that a son who, after attaining majority, continues a member of his father's family, working for him apparently as before, is working for his support, as in his minority, may be overcome by evidence indirect or circumstantial, by the conduct or conversation of the parties.³ So proof that a person is the child of a certain person named is sufficient proof that he is his legitimate child,⁴ and that a child born in wedlock is legitimate; but there is no presumption that a man who marries the mother of a bastard child is its father.⁵

§ 11. A party presumed to know the contents of a writing signed by him.—Every person is presumed to know the contents of a writing signed by himself, or by another at his request; and so of a paper drawn up by one for another, and of matters referred to in such writing.⁶ It is also presumed that the party signing knew the legal effect thereof.⁷

III. INTEREST OF HUSBAND AND WIFE.

The law presumes a loan from the mere fact of the receipt of the wife's money by the husband, and such presumption can only be rebutted by proof of a gift.⁸ But it seems the presumption of a gift by a wife to the husband arises when she applies funds belonging to her for his benefit, or voluntarily turns them over to him to be used in his business or for the support of his family.⁹ In transfers from a husband to

¹ *Puterbaugh v. Puterbaugh* (Ind. App.), 33 N. E. Rep. 808.

² *Ulrich v. Ulrich*, 136 N. Y. 120; 49 N. Y. State Rep. 33.

³ *Donahue v. Donahue* (Minn.), 55 N. W. Rep. 602.

⁴ *McChaskey v. Barr*, 47 Fed. Rep. 154.

⁵ *McDonald's Appeal*, 147 Pa. St. 527.

⁶ *Re Sheldon's Will*, 40 N. Y. State Rep. 369; *Ballou v. Earle* (R. I.), 45

Alb. L. J. 44; *Finn v. Brown*, 142 U. S. 56; *Harris v. Story*, 2 E. D. Smith, 363.

⁷ *Mears v. Graham*, 8 Blackf. (Ind.) 144; *Bliven v. Lydecker*, 130 N. Y. 102; 40 N. Y. State Rep. 636.

⁸ *Re Wormley's Estate*, 137 Pa. St. 101.

⁹ *Reed v. Reed*, 135 Ill. 482. But see *Chadbourne v. Williams*, 45 Minn. 294.

his wife or to another for her benefit, there is a presumption against the wife in favor of her husband's creditors, which she must overcome by affirmative proof.¹ But it seems that the creditor attacking such deed or transfer must show the insolvency of the husband at the time of the purchase or transfer, and that the property was paid for with the debtor's money.² The presumption is that a husband purchased the property in his possession with his own funds instead of funds belonging to his wife;³ and where personal property is found in the possession of a married woman, the presumption of law is that her possession is that of her husband, and the burden rests upon her to show that she is the sole and separate owner.⁴ The presumption is that where the *corpus* or principal of the separate property of a married woman is taken possession of by her husband, it is held by him for her use and benefit, but a different rule prevails as to interest or income.⁵ In Texas goods held by a husband or wife are presumed to be community property.⁶

IV. A PARTY MUST SHOW A FACT OF WHICH HE IS BEST COGNIZANT.

The burden of proof is on the party to show a material fact of which he is best cognizant.⁷ When it is as easy for the plaintiff to prove the negative as it is for the defendant to disprove it, then the burden of proof must rest with him; but where the means of proving the negative are not within the power of the plaintiff, but all the proof on the subject is

¹ Leonard v. Smith, 34 W. Va. 442; Stevens v. Carson, 30 Neb. 544; Osborn v. Wilkes, 108 N. C. 651; Backer v. Meyer, 43 Fed. Rep. 702; Smith v. Tosini (S. D.), 48 N. W. Rep. 299; Gettelmann v. Gitz, 78 Wis. 439; Sargeant v. Fuller, 132 Pa. St. 127; Storrs v. Storrs, 23 Fla. 274; Manchester v. Tibbetts, 121 N. Y. 219; 30 N. Y. State Rep. 721; Claflin v. Pfeiffer, 76 Tex. 469.

² White v. Classby, 101 Mo. 162; Tuscaloosa First Nat. Bank v. Kennedy, 91 Ala. 470; Watson v. Pinkney, 46 N. Y. State Rep. 245; 18 N. Y. Supp. 790.

³ Stephenson v. Felton, 106 N. C. 114; Bucks v. Moore, 36 Mo. App. 529; Rice v. Sayles, 23 Ill. App. 189.

⁴ Hemelreich v. Carlos, 24 Mo. App. 264.

⁵ Denny v. Denny, 123 Ind. 240; Clark v. Clark, 76 Wis. 306; Bartlett v. Wright, 29 Ill. App. 339; Hood v. Jones, 5 Del. Ch. 77.

⁶ Purdom v. Boyd, 82 Tex. 138. And see Gretton v. Weber, 47 Fed. Rep. 852; Re Tobin, 40 N. Y. State Rep. 366; Dimmick v. Dimmick, 95 Cal. 323.

⁷ Ford v. Simmons, 13 La. Ann. 397.

within the control of the defendant, who, if the negative is not true, can disprove it at once, then the law presumes the truth of the negative averment from the fact that the defendant withholds or does not produce the proof which is in his hands, if it exists, that the negative is not true.

V. PRESUMPTION OF JURISDICTION OF COURT.

§ 12. **General jurisdiction.**—Where a court having general jurisdiction acts in a case, its jurisdiction to so act will be presumed;¹ and this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also.² And where it appears that the court was one of record, having a seal and clerk, it will be presumed that it had jurisdiction.³

§ 13. **Regularity of proceedings.**—The regularity of the proceeding of courts of general powers is presumed, and so of the proceedings of inferior courts, jurisdiction being once shown to exist.⁴ From delivery of letters of administration it is presumed that the oath required of the administrator was taken. It will be presumed that the court below did "strict justice" to the parties as required by statute.⁵ Where judgment is shown, the presumption is that the summons was served on the defendant as required by law.⁶ If any presumption of law be reasonable, it is that which favors the regularity of judicial proceedings until something else appears; and the greater the tendency to irregularity, the greater the necessity for violence of presumption against it; this is all that saves our records.⁷ It will be presumed of a judgment rendered

¹ *Wallace v. Cox*, 71 Ill. 518; *German Nat. Bank v. Elwood*, 16 Colo. 244; *Hohn v. Kelly*, 34 Cal. 400; *Hays v. Ford*, 55 Ind. 52.

² *Richie v. Carpenter* (Wash.), 28 Pac. Rep. 380; *Galpin v. Page*, 18 Wall. 364; *Smith v. Mongoga*, 3 N. M. 39; *State v. Gamble*, 108 Mo. 500.

³ *Caughran v. Gilman*, 81 Iowa, 442; *Hallum v. Dickinson*, 54 Ark. 311; *Gage v. Nichols*, 135 Ill. 128; *Henry v. Allen*, 82 Tex. 35.

⁴ *Lyne v. Sanford*, 82 Tex. 58; *Davis v. State*, 17 Ala. 354; *Gray v. Cruin*, 36 id. 559; *State v. Gibson*, 21 Ark. 140; *Stearns v. Stearns*, 32 Vt. 678.

⁵ *Hoag v. Greenwich*, 133 N. Y. 152; 44 N. Y. State Rep. 519; *Grimstead v. Foote*, 26 Miss. 476.

⁶ *German Nat. Bank v. Elwood*, 16 Colo. 244; *Ray v. Rowley*, 1 Hun, 614.

⁷ *Green v. Tower*, 49 Kan. 302; *Jamison v. Weaver*, 84 Iowa, 611;

on service by publication that a proper affidavit on which to base the citation by publication was made, until the contrary is affirmatively shown by something in the record.¹

§ 14. **Limited jurisdiction — Courts of.**— Where proceedings are taken by an inferior court, or are under special authority granted to any tribunal in a special case, or for special purposes, or are not according to the course of the common law, the jurisdiction is not presumed, but must be shown.² But a judgment of a county judge authorizing the bonding of a town is clothed with the same presumptions as adjudications of courts of record having general jurisdiction, as the statute provides that it shall have the same force and effect as other judgments of courts of record.³ But where a statute gives to county courts power to order the sale or partition of real estate in certain cases and its act is attacked, there is no presumption that everything necessary to the validity of the judicial act has been done.⁴ The proceedings are under a special authority delegated to the county court in a particular case, and not under its general jurisdiction as a court of common law or of equity. And where by state statutes service of process by publication is substituted in place of personal service in certain actions and proceedings, that the statute has been strictly followed must be proved, and no presumption of jurisdiction will be indulged in.⁵ When the special powers conferred are brought into action according to the course of the common law, *i. e.*, in the usual form, by regular process and personal service, where a personal judgment is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers.⁶ But where the special powers conferred are exercised in a special manner, or where the gen-

Slicer v. Bank of Pittsburgh, 16 How. (U. S.) 571; *State v. Hinchman*, 27 Pa. St. 479; *Sheldon v. Wright*, 7 Barb. 39.

¹ *Hardy v. Beaty*, 84 Tex. 562; 31 Am. St. Rep. 80. But see *Dennison v. Taylor* (Ill.), 31 N. E. Rep. 148.

² *Goulding v. Clark*, 34 N. H. 148.

³ *Hoag v. Greenwich*, 133 N. Y. 152; 44 N. Y. State Rep. 519.

⁴ *Tolmie v. Thompson*, 3 Cranch, 123; *Goulding v. Clark*, 34 N. H. 148; *Graham v. Whitely*, 26 N. J. L. 262.

⁵ *Galpin v. Page*, 18 Wall. 364; *McMynn v. Wheeler*, 27 Cal. 300; *Com. v. Blood*, 97 Mass. 538.

⁶ *Harvey v. Tyler*, 2 Wall. 332.

eral powers of the court are exercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the jurisdiction of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record. Such jurisdiction is not, therefore, the less to be strictly pursued because the same court may possess over other subjects or other persons a more extended and general jurisdiction.

VI. PRESUMPTIONS AS TO CARRIERS, BAILEES, ETC.

§ 15. **Negligence of.**—Upon proof of delivery of goods to common carriers and their loss by them, it is presumed that they were lost by their negligence;¹ and the same rule applies to bailees for hire. But in the case of common carriers of passengers, as a general rule, some proof of negligence must be given. To this rule there are many exceptions, as, where an injury to a passenger results from the breaking down of a passenger coach, the breaking of a rail, the falling away of an embankment, the breaking down of a bridge, a collision of trains, etc., in such cases the law will presume negligence on the part of the company until the contrary is shown.² But in all cases it must be remembered that neither fault nor negligence is to be presumed without some evidence upon which to predicate it.³ In other words, the plaintiff must show an injury which *prima facie* resulted from some fault on the part of the defendant.⁴

§ 16. **In an accident case.**—As a general rule negligence must be proved and will not be presumed;⁵ and the proof of the occurrence of an accident does not raise a presumption of negligence,⁶ where no contractual relation exists between the parties,⁷ especially when the accident is of a kind which

¹ Tarbox v. Eastern Steamboat Co., 50 Me. 339; Steamer Niagara v. Cordes, 21 How. (U. S.) 7.

² Pittsburg, etc. R. Co. v. Williams, 74 Ind. 462.

³ Lyndsay v. Connecticut & Pass. River R. Co., 27 Vt. 643.

⁴ Terry v. New York C. R. Co., 22 Barb. 574; Buel v. New York C. R. Co., 31 N. Y. 314.

⁵ De Soucey v. Manhattan R. Co., 39 N. Y. State Rep. 79; Richmond & D. R. Co. v. Yeamans, 86 Va. 860.

⁶ Bohr v. Lombard, 53 N. J. L. 233; Hawkins v. Front Street Cable Co., 28 Am. St. Rep. 72.

⁷ Turnier v. Lathers, 59 Hun, 623; 36 N. Y. State Rep. 831.

would not naturally result from negligent management. To throw upon a carrier the burden of disproving negligence in a case of injury to a passenger, it must be shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business.¹ Courts have no right to guess that one alleged to have been killed by negligence was free from fault;² and the presumption of negligence from the fact of injury, if it arises at all, can arise only when defendants have the actual management of the thing causing the injury and fail to explain the cause,³ and which in the ordinary course of matters does not happen if those having the management use proper care.⁴ The plaintiff has the burden of showing that defendant did not use due care.⁵ Thus it is incumbent upon a railroad employee who attributes his injury to the fact of brake-shoes being worn thin, to prove the facts permitting the inference that the brake could be applied, or that when applied it was not as effective as it should or would have been with thicker brake-shoes.⁶ And whenever an employee is connected with the act which injures him, the presumption is not against the employer, but the employee must show that he is without fault.⁷ The mere fact that a passenger seated in a car at an open window was struck on the arm by a missile, which he did not see and which could not be found, with sufficient force to fracture the arm, does not raise a presumption of the carrier's negligence.⁸ It has been laid down as a rule in many of the states that the fact that a damaging fire was propagated by sparks from a locomotive of a railroad company raises a presumption of negligence, casting the burden of proof on the company to show that the locomotive was

¹ Thomas v. Philadelphia & R. R. Co., 148 Pa. St. 180.

² Riordan v. Ocean Steamship Co., 124 N. Y. 655; 32 N. Y. State Rep. 328.

³ Lennon v. Rawitzer, 57 Conn. 583; Gallagher v. Proctor, 84 Me. 41.

⁴ Hill v. Scott, 38 Mo. App. 370.

⁵ Dowell v. Guthrie, 99 Mo. 653.

⁶ Smith v. New York C. & Hudson Riv. R. Co., 118 N. Y. 645; 30 N. Y. State Rep. 96; Texas & N. O. R. Co.

v. Crowder, 76 Tex. 499; Humphries v. Newport News & M. V. Co., 23 W. Va. 135; Hudson v. Charleston, C. & C. R. Co., 104 N. C. 491.

⁷ Western & A. R. Co. v. Vandiver (Ga.), 11 S. E. Rep. 781; Brunswick v. Strilka, 30 Ill. App. 186; Wall v. Delaware, L. & W. R. Co., 28 N. Y. State Rep. 132; 54 Hun, 454; Foss v. Baker, 62 N. H. 247.

⁸ Thomas v. Philadelphia & R. R. Co., 148 Pa. St. 180.

properly constructed and managed.¹ It has also been laid down as a rule that the burden is on the railroad company, when sued for the killing of an animal by a train, to acquit itself of the charge of negligence.²

§ 17. **By tugs, ships, etc.**—In admiralty a libellant in a suit for negligence is not required to establish his own freedom from contributory negligence.³ The explosion of the steam boiler of a steam vessel is *prima facie* evidence of negligence.⁴ So is the collision of one vessel with another;⁵ and damage to a tow from contact with a pier in fair weather.⁶ In all cases of collisions between steamers and sailing vessels, the former are presumably in fault;⁷ but the burden is on the plaintiff to show negligence.⁸

§ 18. **By carriers as to passengers.**—An accident to a passenger is *prima facie* evidence of negligence on the part of the carrier;⁹ and the burden of explaining or accounting for a collision or accident by which a passenger is injured or killed is upon the carrier.¹⁰ This rule applies to the collision of an engine with an animal on the track;¹¹ or from the derailment of a car;¹² or the separation of a train into two

¹ Kelsey v. Chicago & N. W. R. Co., 43 Am. & Eng. R. Cas. 43; Daly v. Chicago, M. & St. P. R. Co. (Minn.), 45 N. W. Rep. 611; Koontz v. Oregon R. & Nav. Co. (Oreg.), 43 Am. & Eng. R. Cas. 11; Eagle v. Chicago, M. & St. P. R. Co., 77 Iowa, 661.

² Joyner v. South Carolina R. Co., 26 S. C. 49.

³ The Frank & Willis, 45 Fed. Rep. 494.

⁴ Grimly v. Hankins, 46 Fed. Rep. 400.

⁵ The Britannia, 43 Fed. Rep. 96; The Charles Hebard, 46 id. 137; The Normandia, 43 id. 151; Inland & S. Coasting Co. v. Tolson, 139 U. S. 551.

⁶ Western Assur. Co. v. The Sarah J. Weed, 40 Fed. Rep. 844; Bouker v. Smith, id. 839.

⁷ The J. D. Peters, 42 Fed. Rep. 269.

⁸ John Spry Lumber Co. v. The C. H. Green, 76 Mich. 320; Singleton v.

Phoenix Ins. Co., 132 N. Y. 298; 44 N. Y. State Rep. 414.

⁹ Glieson v. Virginia M. R. Co., 140 U. S. 435; 44 Alb. L. J. 33; Georgia R. Co. v. Love, 91 Ala. 431; Wynn v. Central Park & N. E. R. R. Co., 38 N. Y. State Rep. 181; 14 N. Y. Supp. 172; Murphy v. St. Louis, I. M. & S. R. Co., 43 Mo. App. 342; Louisville, N. A. etc. R. Co. v. Taylor, 126 Ind. 126; Dimmitt v. Hannibal & St. J. R. Co., 40 Mo. App. 654; Treadwell v. Whittier, 80 Cal. 574.

¹⁰ Chicago City R. Co. v. Engel, 35 Ill. App. 490; Magoffin v. Missouri P. R. Co., 102 Mo. 540; Coster v. Kansas City Cable R. Co., 42 Fed. Rep. 37.

¹¹ Louisville, N. A. & C. R. Co. v. Hendricks, 128 Ind. 462.

¹² Alabama G. S. R. Co. v. Hill, 93 Ala. 514; Norton v. St. Louis & H. R. Co., 40 Mo. App. 642; Ohio & M. R. Co. v. Voight, 122 Ind. 288; Kansas

parts;¹ or the sudden jerk of a train injuring a passenger.² In short, where the cause of the injury to a passenger arose from an apparatus wholly under the control of the carrier and furnished and applied by it, an inference of negligence is raised.³

§ 19. **Contributory negligence.**—In New York, Illinois and a few other states the plaintiff assumes the burden of showing that the injury occurred without fault on the part of the person injured.⁴ But the general rule in this country is that the burden of proving contributory negligence is upon the defendant, unless the plaintiff's testimony discloses such negligence.⁵ The general presumption is that persons of mature years and in possession of their senses are ordinarily prudent and will use ordinary diligence to avoid danger;⁶ and the burden of proving voluntary exposure to danger as a defense to an action is on the defendant.⁷ But the rule that where the negligence of a person is the ground upon which a recovery of damages is sought, the burden of proof is on the plaintiff, who must show the negligence of which he complains,

City, F. S. & M. R. Co. v. Stoner, 49 Fed. Rep. 209; Coke v. Long Island R. Co., 65 Hun, 619; 47 N. Y. State Rep. 200; North Chicago Street R. Co. v. Cotton, 140 Ill. 486.

¹ Louisville, N. A. & C. R. Co. v. Taylor, 126 Ind. 126.

² Murphy v. St. Louis, I. M. & S. R. Co., 43 Mo. App. 342.

³ Miller v. Ocean Steamship Co., 118 N. Y. 199; 28 N. Y. State Rep. 874; Baltimore & R. Turnpike Road v. State, 71 Md. 573; Brinckhord v. Western U. Tel. Co., 58 Hun, 610; 35 N. Y. State Rep. 589.

⁴ Rodrian v. New York, N. H. & H. R. Co., 125 N. Y. 526; 35 N. Y. State Rep. 814; Mulligan v. New York Central & H. R. Co., 58 Hun, 602; 33 N. Y. State Rep. 534; North Chicago St. R. Co. v. Louis, 148 Ill. 9; Louisville, N. A. & C. R. Co. v. Stommel, 126 Ind. 35; Baltimore & R. Turnp. Road v. State, 71 Md. 573.

⁵ Gill v. Homrighausen, 79 Wis. 634; Waterman v. Chicago & A. R. Co., 82 Wis. 613; 52 Amer. & Eng. R. Cas. 592; Darrell v. Johnson, 52 N. W. Rep. 890; Georgia P. R. Co. v. Davis, 92 Ala. 300; Brodwell v. Pittsburgh & W. E. R. Co., 139 Pa. St. 404; Griffith v. Baltimore & O. R. Co., 44 Fed. Rep. 574; Inland & S. Coasting Co. v. Tolson, 139 U. S. 551; Central R. Co. v. Smith, 74 Md. 212; Vinson v. Chicago, St. P., M. & O. R. Co., 47 Minn. 265.

⁶ Lyman v. Boston & M. R. Co. (N. H.), 20 Atl. Rep. 976; Fugler v. Bothe, 43 Mo. App. 44; Phillip v. Milwaukee & N. R. Co., 77 Wis. 349; Riordan v. Ocean Steamship Co., 124 N. Y. 655; 36 N. Y. State Rep. 476.

⁷ Budenfield v. Massachusetts Mut. Acc. Ass'n (Mass.), 20 Ins. L. J. 716; Phillip v. Milwaukee & N. R. Co., 77 Wis. 349.

applies in all cases except in the case of common carriers.¹ And the fact that an accident occurred which caused an injury is not generally of itself sufficient to authorize an inference of negligence.² The getting on a moving train is *prima facie* evidence of contributory negligence.³

§ 20. **As to property.**—The burden in the first instance is on the plaintiff suing a carrier for loss of or injury to goods while *in transitu* to show the quantity and good condition of the goods when shipped, and a failure to deliver the quantity shipped, or a delivery in a damaged condition.⁴ But after the plaintiff has shown a delivery of goods to a carrier, and that they were lost or damaged during the transit, the burden is cast upon the carrier to show that such loss or injury was not occasioned by his negligence or default,⁵ or was within the terms of an exception from liability in the bill of lading.⁶ A railroad company will be presumed to have delivered property in the same condition in which it was received, in the absence of proof that it was delivered to it or a connecting road in a condition different from that in which it was delivered by the company.⁷ But when the plaintiff has shown that the goods were damaged after being shipped, the burden of proof is cast upon the carrier to show that the damage occurred on some other than its line, when the goods were delivered to it to be shipped over its own and connecting lines,⁸ and that it safely transported the goods over its own line and delivered them to the connecting carrier.⁹ The fact of breakage or leakage of casks of wine shipped by a

¹ Pawling v. Haskins, 132 Pa. St. 617.

² Dobbins v. Brown, 119 N. Y. 188; 28 N. Y. State Rep. 957.

³ Browne v. Raleigh & G. R. Co., 108 N. C. 34.

⁴ Cooper v. Georgia P. R. Co., 92 Ala. 329; Boehl v. Chicago, M. & St. P. R. Co., 44 Minn. 191.

⁵ Browning v. Goodrich Transp. Co., 78 Wis. 391; Louisville, N. A. & C. R. Co. v. Nicholai (Ind. App.), 45 Alb. L. J. 412; Cumming v. The Baracouta, 40 Fed. Rep. 498; Christie v. The Craighton, 41 id. 62; Chapin

v. Chicago, M. & St. P. R. Co., 79 Iowa, 582; The Mascott, 51 Fed. Rep. 605; Wilson v. California C. R. Co., 94 Cal. 166.

⁶ Missouri P. R. Co. v. China Mfg. Co., 79 Tex. 26.

⁷ Missouri P. R. Co. v. Breeding (Tex. App.), 16 S. W. Rep. 184.

⁸ Union P. R. Co. v. Marston, 30 Neb. 241; Flynn v. St. Louis & S. R. Co., 43 Mo. App. 424; Phoenix Clay Pottery Works v. Pittsburgh & L. E. R. Co., 139 Pa. St. 284.

⁹ Georgia P. R. Co. v. Hughart, 90 Ala. 36.

carrier, in the absence of proof that the casks were of requisite strength to resist the ordinary handling, does not raise any presumption of negligence;¹ neither does proof of the loss of goods by fire.² But the non-delivery of goods intrusted to a bailee for hire to be transported to another place is presumptive evidence of negligence, and the burden of showing the circumstances of the loss rests on the bailee.³

§ 21. **By railroad trains.**—In some states it is held that proof that a fire originated from sparks or cinders from a locomotive raises a presumption of negligence on the part of the railroad company.⁴ And a *prima facie* case of negligence, made out by evidence that a train threw out the fire by which property was damaged, cannot be rebutted by showing merely that the machinery and appliances were of the proper character and in good condition, without showing that they were handled with due care at the time the fire was thrown out.⁵ A *prima facie* case has been made out against a railroad company whenever it is shown that its road has not been fenced and that an animal has passed upon the track and been killed or injured;⁶ and the burden of proof is on the railroad company to show that animals killed upon its track at a place where it was not fenced were pastured by the plaintiff on the right of way.⁷ But the mere fact that an animal was killed by a train raises no presumption of negligence on the part of a railroad company or its servants.⁸ The fact that an iron fell from an elevated railroad and injured a person there-

¹ Roth v. Hamburg A. P. Co., 59 N. Y. Supr. Ct. 49; 36 N. Y. State Rep. 89; Draper v. Delaware & H. C. Co., 118 N. Y. 118; 27 N. Y. State Rep. 931.

² Louisville & N. R. Co. v. Manchester Mills, 88 Tenn. 653.

³ Wheeler v. Oceanic Steam Nav. Co., 125 N. Y. 155; 43 Alb. L. J. 129; Board v. Illinois C. R. Co., 79 Iowa, 518; Louisville & N. R. Co. v. Wynne, 88 Tenn. 320; Ouderkirk v. Central Nat Bank, 119 N. Y. 263; 29 N. Y. State Rep. 573.

⁴ White v. Chicago, M. & St. P. R. Co. (S. D.), 47 N. W. Rep. 146; Fort

Scott, W. & W. R. Co. v. Karracker, 46 Kan. 511; Logan v. Wabash W. R. Co., 43 Mo. App. 71; Hover v. Missouri P. R. Co. (Mo.), 16 S. W. Rep. 480; Biering v. Gulf, C. & S. F. R. Co., 79 Tex. 584.

⁵ Johnson v. Northern P. R. Co., 1 N. D. 354; Greenfield v. Chicago & N. W. R. Co., 83 Iowa, 270.

⁶ Missouri P. R. Co. v. Baxter (Kan.), 26 Pac. Rep. 49.

⁷ Randall v. Richmond & D. R. Co., 107 N. C. 748; Heller v. Abbott, 79 Wis. 409.

⁸ Atchison, T. & S. F. R. Co. v. Walton, 3 N. M. 319.

under raises a presumption of negligence on the part of the company.¹ But the presumption of negligence on the part of a railroad company which prevails in the case of an injury to its passengers does not obtain in case of injuries to a person or property crossing a railroad track by collision with a train. When a person is thus injured, the fault is *prima facie* his own; and he must show affirmatively that his fault or negligence did not contribute to the injury before he can recover therefor;² and the rule is not relaxed in favor of one who was being carried in a vehicle owned and driven by another at the time of the accident.³ Fire communicated by sparks from an engine makes a *prima facie* case of negligence.⁴

VII. OFFICIAL ACTS—PRESUMPTIONS OF AUTHORITY.

§ 22. **Proof of official capacity.**—The presumption is that one who is proved to have acted in an official capacity possessed the necessary and proper authority;⁵ as that he was regularly appointed or elected as required by law.⁶ That he has acted notoriously as a public officer has been deemed *prima facie* evidence of his character, without producing his commission or appointment.⁷ This rule is in accordance with and embodied in the maxim, *omnia præsumuntur rite esse acta*, and is regarded as one of the most important presumptions of the law.⁸ In obedience to this presumption, the burden is always upon the party alleging it, to show a neglect of

¹ Volkmar v. Manhattan R. Co., 134 N. Y. 418; 31 N. Y. State Rep. 172; Maher v. Manhattan R. Co., 53 Hun, 506; 26 N. Y. State Rep. 742; Mossemann v. Manhattan R. Co., 32 id. 61.

² Beckwith v. New York C. & H. R. R. Co., 125 N. Y. 759; Terre Haute & I. R. Co. v. Clem, 123 Ind. 15; Thomas v. Citizens' Pass. R. Co., 132 Pa. St. 504.

³ Brickell v. New York C. & H. R. R. Co., 120 N. Y. 290; 30 N. Y. State Rep. 932.

⁴ Polhaus v. Atchison, T. & S. F. R. Co., 45 Mo. App. 153. And see Sugarmann v. Manhattan Elev. R. Co.,

42 N. Y. State Rep. 30; Eddy v. Lafayette, 49 Fed. Rep. 807; Cronk v. Chicago, M. & St. P. R. Co. (S. D.), 54 Am. & Eng. R. Cas. 525.

⁵ Demings v. Supreme Lodge K. of P., 131 N. Y. 522; 43 N. Y. State Rep. 872; Jay v. Carthage, 48 Me. 353; Hamlin v. Dingman, 5 Lans. 61; Nelson v. People, 23 N. Y. 293.

⁶ McClaskey v. Barr, 47 Fed. Rep. 154; Hathaway v. Addison, 48 Me. 440; Eaton v. White, 18 Wis. 518; Cooper v. Moore, 44 Miss. 386.

⁷ Jacob v. United States, 1 Brock. 528; State v. Perkins, 24 N. J. L. 409.

⁸ Pinkham v. Cockell, 77 Mich. 265; Taylor on Ev. 156.

official duty or irregularity in its performance.¹ The mere claim to be a public officer, and the performance of a single or even a number of acts in that character, will not necessarily in all cases constitute a person an officer *de facto*; but there must generally be some color of appointment or election, or an acquiescence on the part of the public for a length of time which affords a presumption of such appointment or election.² In actions against an officer by proof of such acts, he is estopped from denying his official character. An officer *de facto* is one whose acts, though he was not a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons;³ but the presumption that public officers have done their duty is not a substitute for proof of an independent and material fact.⁴ The fact that it was the duty of a judge to publish notice of an election raises no presumption that the notice was in fact published;⁵ and a presumption that a request for aid was made by one assisted by public officers as a poor person will not be made as a foundation of an alleged right to recover compensation therefor from her estate.⁶

VIII. PRESUMPTION THAT THE USUAL COURSE OF BUSINESS WAS FOLLOWED.

In commercial transactions the presumption is that the usual course of business was followed by the parties thereto. Thus, where a sum expended by a husband on his wife's property is not in excess of her separate income received by him, the presumption is that he applied her income and not his earnings to the improvement of her estate;⁷ so the giving of a promissory note is *prima facie* evidence of an accounting and settlement of all demands between the parties;⁸ and the

¹ Dobbs v. Justices, etc., 7 Ga. 624; Schley v. Jones, 131 Pa. St. 62; Collins v. Valleau, 79 Iowa, 631; Paul v. Malone, 87 Ala. 544; State v. Woodward, 123 Ind. 30; Wilkins v. Tourtellott, 42 Kan. 176; Washington v. Hosp, 43 id. 324.

² Wilcox v. Smith, 5 Wend. 231.

³ State v. Carroll, 38 Conn. 449.

⁴ United States v. Carr, 132 U. S. 644.

⁵ Toole v. State, 88 Ala. 158.

⁶ Albany v. McNamara, 117 N. Y. 168; 27 N. Y. State Rep. 165.

⁷ Dickson v. Shay, 45 N. J. Eq. 821.

⁸ Davis v. Gallagher, 124 N. Y. 484; 28 N. Y. State Rep. 882.

presumption is that services rendered for the benefit of the estate of a married woman, of which she knows at the time, were rendered at her request.¹

IX. AGREEMENT TO PAY FOR SERVICES PRESUMED WHEN.

An agreement to pay for services rendered and accepted is presumed, unless the parties are members of the same family or near relatives.² Under certain circumstances, where one man labors for another, a presumption of fact will arise that the person for whom he labors is to pay him the value of his services. But where the services are rendered between members of the same family no presumption will arise. The law takes notice very properly of the customs of hospitality and friendly intercourse usual among mankind.³ It is proved that medical services were rendered by A., a physician, to B., deceased. The law presumes a promise by B. to pay for them. On the marriage of A. to B. the former goes to live with B.'s father by invitation, without any agreement as to payment of board for himself and wife. There is no presumption that he agreed to pay board.⁴ A step-father assumes the parental relation towards B., an infant, the child of his wife by another husband. B. renders services to the step-father. There is no presumption of a promise to pay by either party.⁵ The same rule holds good as between brothers.⁶ L. is the mother of K.'s wife and lives with them for ten years. There is no presumption of an agreement by her to pay for board, etc., during this time.⁷

¹ *Carter v. Morris*, 26 N. Y. State Rep. 508; 116 N. Y. 310.

² *Grant v. Grant*, 109 N. C. 710.

³ *Grant v. Grant*, 109 N. C. 710.

⁴ *Wilcox v. Wilcox*, 48 Barb. 327.

⁵ *Williams v. Hutchinson*, 3 N. Y. 312; *Andrews v. Foster*, 17 Vt. 556.

⁶ *Bowen v. Bowen*, 3 Bradf. 336; *Fitch v. Peckham*, 16 Vt. 150.

⁷ *King v. Kelly*, 28 Ind. 89.

CHAPTER XVII.

PRESUMPTIVE EVIDENCE (CONTINUED).

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| <p>§ 1. Presumption as to negotiable paper.</p> <p>2. Presumption as to consideration of commercial paper.</p> <p>3. Presumption as to protest of bills or notes.</p> <p>4. Presumption as to receipt of letter from mailing.</p> <p>5. Presumption as to documents regular on their face.</p> <p>6. Presumption as to correctness of date.</p> <p>7. A person presumed to act honestly.</p> <p>8. Presumption as to marriage.</p> <p>9. Presumption as to legitimacy.</p> <p>10. Presumption against a spoliator.</p> <p>11. Alteration, suppression, destruction or manufacturing of evidence.</p> <p>12. Presumption of continuance of things.</p> <p>13. Domicile, residence, solvency, infancy, partnership.</p> <p>14. Sanity or insanity.</p> <p>15. Character and habits of persons.</p> <p>16. Presumptions not retrospective.</p> <p>17. Presumption of life.</p> <p>18. Persons presumed to be dead when.</p> | <p>§ 19. Absentees — Who are.</p> <p>20. Not been heard of—Meaning of.</p> <p>21. Absentee's residence — Meaning of.</p> <p>22. Presumption of death before seven years.</p> <p>23. When presumption of death after seven years does not arise.</p> <p>24. Presumption of survivorship of persons who perished in same accident.</p> <p>25. Where age, sex or health may raise a presumption of survivorship.</p> <p>26. Presumption of identity.</p> <p style="text-align: center;">PRESUMPTION OF INTENT.</p> <p>27. In general.</p> <p>28. Revocation of will.</p> <p>29. When the doing of an act does not raise a presumption.</p> <p>30. A person is presumed to do what he has the right and power to do.</p> <p>31. Presumptions from the course of nature.</p> <p>32. A person is presumed to do what it is his interest to do.</p> <p>33. Presumption of payment.</p> <p>34. Other than by lapse of time.</p> |
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§ 1. **Presumptions as to negotiable paper.**—Negotiable paper is presumed to have been regularly negotiated, and to be or to have been regularly held, except where it was procured or put in circulation through fraud or duress and is illegal.¹ The law was thus framed and has been so adminis-

¹ *Palmer v. Mt. Sterling Nat. Bank*, 13 Ky. L. Rep. 790; *Home F. & F. Mis. Soc.*, 3 Ind. App. 91; *Garrigus v.* 91.

tered in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value; and this rule is so comprehensive that the title and possession are considered as one and inseparable; and in the absence of any explanation the law presumes that a party in possession holds the instrument for value until the contrary is made to appear.¹ It is also presumed that the holder of a promissory note is a *bona fide* holder for value received;² that it was transferred to the plaintiff on the day of its date;³ and where the note is indorsed without date, the presumption is that the indorsement was made before the note became due.⁴ One alleging simulation or illegality in the consideration of a transfer of a promissory note must prove his allegations.⁵ To cast the burden upon the holder of a note to prove that he became the owner in good faith before maturity and for value, the evidence must show that it was procured by fraud and not merely without consideration.⁶ The ordinary presumptions in favor of innocent holders of negotiable paper acquired before maturity are modified as to a note shown to have had a fraudulent inception; and where it is shown that the note was procured by fraud, or that it was otherwise illegal in its inception, the plaintiff has the *onus* of showing that he took it *bona fide* for value before due and without any notice of the illegality.⁷ The defendant may show the facts attending the execution of commercial paper, and proof of such defense imposes upon plaintiff the burden of proving himself to be a *bona fide* holder for value;⁸

¹ Perot v. Cooper, 17 Colo. App. 80; 31 Am. St. Rep. 258; Tourtelotte v. Brown, 1 Colo. App. 408; Crabtree v. Atchison, 13 Ky. L. Rep. 321; Nott v. Thomas, 35 S. C. 461; Crow v. Conant, 90 Mich. 247; 30 Am. St. Rep. 427; First Nat. Bank v. Green, 43 N. Y. 298.

² Lehman v. Tallahassee Mfg. Co., 64 Ala. 567.

³ Noxon v. De Wolfe, 10 Gray, 343; Hendricks v. Judah, 1 Johns. 319.

⁴ Tome v. Gerloch, 64 Hun, 635; 46 N. Y. State Rep. 485; Walker v. Davis, 33 Me. 516.

⁵ Newman v. Irwin, 43 La. Ann. 1114.

⁶ Galvin v. Meridian Nat. Bank, 129 Ind. 439; Herman v. Gunther, 83 Tex. 66; 29 Am. St. Rep. 632.

⁷ Joy v. Defendorff, 130 N. Y. 6; Auerbach v. Peetsch, 44 N. Y. State Rep. 493; Ross v. Drinkhard, 35 Ala. 434; Cover v. Mayors, 23 Ark. 850; Fuller v. Hutchins, 10 Cal. 523; Hazard v. Spencer, 17 R. I. 561.

⁸ Ogden v. Pope, 44 N. Y. State Rep. 646.

and evidence that the note in suit was stolen puts plaintiff upon proof of the *bona fides* of his holding.¹

§ 2. **Presumption as to consideration of note.**— Value received need not appear on the face of a note, as those words express only what the law implies. In other words, a consideration is implied from the character of the instrument. It is not necessary to allege or prove consideration in an action upon a note, whether negotiable or not. A promissory note is defined to be a written engagement by one person to pay absolutely and unconditionally to another person therein named, or to the bearer, a certain sum of money at a specified time, or on demand.²

§ 3. **Presumption of protest of bills or notes.**— While, as a general rule, where the holder of negotiable paper has been guilty of laches, and that fact appears on the trial in an action against an indorser or drawer, the holder cannot recover on a subsequent promise without showing that the promise was made with full knowledge of the laches, where the fact of laches does not appear, a promise by an indorser or drawer after maturity to pay the note or bill is presumptive proof of demand and notice. The theory is said to be that presumptively a man will not promise to pay without knowing that he is liable. The evidence is received for the purpose of showing that there has been no laches. And although there is no proof at all of the manner of presentment and demand, the promise of the indorser or drawer is presumptive evidence of a legally formal demand and notice. So proof of a direct or conditional promise to pay after a bill becomes due, of a partial payment, or of an offer of a composition, or of an acknowledgment of his liability to pay the bill, has been held to be competent evidence to go to a jury of a regular notice of the dishonor of a bill, and to warrant a jury in presuming that the regular notice had been given.³

§ 4. **Mailing notice — Presumption as to.**— The mailing of a letter properly directed to a party to be charged raises a pre-

¹ *Claffy v. Farrow*, 44 N. Y. State Rep. 789.

² *Cooledge v. Ruggles*, 15 Mass. 387; *Carnright v. Gray et al.*, 127 N. Y. 92; 38 N. Y. State Rep. 56.

³ *2 Parsons on Bills and Notes*, 497; *First Nat. Bank, etc. v. Moffatt*, 39 N. Y. State Rep. 668.

sumption that it is received; for it is presumed that letters sent by post to a party, at his residence, are received by him in due course. But this is a presumption of fact and not of law, and may be repelled by proof. Notice by mail of the dishonor of commercial paper is in most cases sufficient by the law merchant to charge an indorser. It is part of the contract that notice may be given in this way, and it is not material in fixing the liability of the indorser whether he receives it or not.¹

§ 5. Presumption as to documents regular on their face. An ancient will found in the proper custody and executed in the manner provided by law under certain circumstances will be presumed to have been executed under such circumstances and to be valid.² Documents regular on their face are presumed to have been properly executed and to have undergone all formalities essential to their validity.³ Thus, where a person's signature to a deed is proved, the sealing and delivery of the deed is presumed.⁴ It is also presumed that it was delivered on the day it bears date.⁵ Where the consideration of a deed is not expressed, the presumption is that it was the value in money of the property.⁶ The law also presumes that a paper was stamped as the law requires.⁷

§ 6. Presumption as to correctness of dates.—Dates found in written instruments are presumed to be correct. Thus, the presumption is that a letter was written at the time it bears date;⁸ that a bill of exchange was issued at the time it bears date; that a receipt was made on the day it bears date; and that a deed was executed on the day it bears date.⁹ The presumption is that a bill or note indorsed in blank was indorsed on the day of its date or before due.¹⁰

§ 7. A person presumed to act honestly.—Fraud is never presumed, either at law or in equity.¹¹ And the defendant in

¹ Austin v. Holland, 69 N. Y. 576. C. P. 286; Thayer v. Barney, 12 Minn.

² Gildersleeve v. New Mexico Min. 518.

Co. (N. M.), 27 Pac. Rep. 318.

⁸ Pullen v. Hutchinson, 25 Me. 249.

³ Munroe v. Gates, 48 Me. 461.

⁹ Smith v. Porter, 10 Gray, 66;

⁴ Andrews v. Motley, 12 C. B. (N. S.) 526.

Costigan v. Gould, 5 Denio, 290; Knisley v. Sampson, 100 Ill. 573.

⁵ People v. Snyder, 41 N. Y. 397; ¹⁰ Benthall v. Judkins, 12 Metc. 265; Smiley v. Fries, 104 Ill. 416.

Hutchins v. Flintge, 2 Tex. 473.

⁶ Clements v. Landman, 26 Ga. 401.

¹¹ Calhoun v. McKnight, 44 La. Ann. 575; Wright v. Prescott, 2 Barb. 196.

⁷ Bradlaugh v. De Ren, L. R. 3

an action for fraud is entitled to the application of the rule that the presumptions are in favor of the innocence of the accused;¹ and it seems that fraud will not be implied by reason of the relationship of the parties to a conveyance, although it may lessen the effect of their statements when other circumstances exist pointing to fraud.² There is no presumption of honesty in a transaction by which the title of a *cestui que trust* is divested and invested in the trustee, when the relation of the parties appears on the face of the instrument.³ A confession of judgment to a creditor for a debt will be presumed to have been taken by the creditor for his own benefit, and not to defraud other creditors.⁴ Acts of defendant in an action for divorce which might appear suspicious and improper, but are capable of an innocent interpretation, must be so construed.⁵ The presumption of innocence of a person charged with a criminal offense continues through the trial, and all the evidence is to be reconciled with this presumption.⁶ Thus, the presumption is that a man and woman who live and cohabit together are married.⁷ But it is different where a negro and a white woman live together, in a state where marriages between them are prohibited. Where, after a husband and wife separate, the former goes and lives with another woman, the presumption is that he has obtained a divorce.⁸ So where A. marries C., having a husband, B., living, and B. subsequently dies, and A. and C. continue to cohabit, the presumption is that they have been married after B.'s death.⁹

¹ Hatch v. Spooner, 59 Hun, 625; 37 N. Y. State Rep. 151; Geresche v. McDonald, 103 Mo. 1; Re Davis' Estate, 10 Mont. 228; Kenosha Stove Co. v. Shedd, 82 Iowa, 540; Smith v. Ogilvie, 127 N. Y. 143; 38 N. Y. State Rep. 150; Schreyer v. Scott, 134 U. S. 405; Farrar v. Churchill, 133 id. 609; Bernheimer v. Rindskoff, 116 N. Y. 428.

² Martin v. Fox, 40 Mo. App. 664; Oliphant v. Leversidge (Ill.), 27 N. E. Rep. 921.

³ Winter v. Truax, 87 Mich. 324; 24 Am. St. Rep. 160; White v. Johnson. 4 Wash. 113.

⁴ Knower v. Central Nat. Bank, 124 N. Y. 552; 37 N. Y. State Rep. 89.

⁵ Steffens v. Steffens, 33 N. Y. State Rep. 643; Fenno v. Hannan, 127 N. Y. 635; Hampton v. Hampton, 87 Va. 148.

⁶ Farley v. State, 127 Ind. 419; Gibson v. State, 89 Ala. 121; Panama R. Co. v. Johnson, 58 Hun, 557; 35 N. Y. State Rep. 560.

⁷ Post v. Post, 70 Ill. 484.

⁸ Blanchard v. Lumbert, 43 Iowa, 228.

⁹ Jackson v. Clark, 18 Johns. 347.

§ 8. **Presumption as to marriage.**—The presumption is that when a man and woman live together as husband and wife, and declare themselves to be such, they are lawfully married; and their children born while so living are legitimate.¹ And the fact of cohabitation as man and wife raises a presumption of legal marriage;² but a relation illicit at its commencement, and known to be so by the parties, raises no presumption of marriage;³ and the presumption is that the illicit relation continues.⁴

§ 9. **Presumption of legitimacy.**—A person born during the continuance of a valid marriage between his mother and any man, or within such time after the dissolution thereof, and before the celebration of another valid marriage, that his mother's husband could, according to the course of nature, have been his father, is presumed to be the legitimate child of his mother's husband.⁵ The rule is the same where the child is born in wedlock, whether begotten before or after the marriage; and where the mother is visibly pregnant at the time of the marriage, the presumption is not rebuttable; for a man who marries a woman whom he knows to be in that condition is to be considered as acknowledging by a most solemn act that the child is his.⁶

§ 10. **Presumptions against a spoliator.**—The omission of a party to an action to testify to facts or to produce evidence in explanation of or to contradict adverse testimony raises a presumption against his claims, unless the evidence is not peculiarly within his power.⁷ It is a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted.⁸ To smother evidence is not much better than to fabricate. The presumption *in odium spoliatoris* is perfectly legitimate. It is so natural and so just that it is part of every civilized code. It ought to be under-

¹ Robinson v. Taylor, 42 Fed. Rep. 803; Jones v. Gilbert, 135 Ill. 27.

⁵ Stephen's Ev., art. 98; Caujolle v. Ferrie, 23 N. Y. 90.

² Re Dulas Succession (La. Ann.), 10 S. Rep. 406; State v. Schwitzer, 57 Conn. 532.

⁶ Montgomery v. Montgomery, 3 Barb. Ch. 132.

³ Grimm's Appeal, 131 Pa. St. 199.

⁷ Warner v. Litzinger, 45 Mo. App. 106; Lawrence v. Lawrence, 15 Fed. Rep. 635.

⁴ White v. White, 82 Cal. 427; Richardson's Appeal, 132 Pa. St. 292.

⁸ McDonough v. O'Neil, 113 Mass. 92.

stood that where a party has the subject-matter of the controversy under his exclusive control, it is never safe to refuse the witnesses on the other side an opportunity to examine it.¹ Thus, the failure in an answer to state a fact material to a defense raises the presumption that such fact does not exist.² And the failure of a defendant to answer plaintiff's averments is an element proper to be considered, with other evidence in the case, in determining their truth.³ Where a party has in his possession evidence which would illustrate his case, and fails to produce it, the presumption will be against him.⁴ But it is not sufficient to supply independent evidence of a fact which is wholly unproved by other evidence.⁵ Thus, where the defendant neglects or refuses to produce witnesses in charge of his vessel when an accident happened, the presumption is that they would not help him.⁶ So where A. refuses to produce a deed which is part of a title which he claims, the law presumes that, if produced, the deed would injure his claim.⁷ These presumptions are received on the ground that he who withholds the truth does so because he knows that it will work against him, and that no man prefers darkness to light, except because he is conscious that his deeds are evil.⁸ The rule that the failure of defendant to testify shall not be considered against him applies only to criminal cases.⁹

§ 11. **Alteration, suppression, destruction or manufacturing of evidence.**—The maxim *omnia contra spoliatores* embraces most frequently cases of the destruction of written

¹ State v. Keith, 47 Minn. 559.

² Cheney v. Dunlap, 27 Neb. 401.

³ Schney v. Schaeffer, 130 Pa. St. 16; Van Slyke v. Chicago, St. P. & K. C. R. Co. (Iowa), 45 N. W. Rep. 396; Lake v. Nolan, 81 Mich. 112; Freemont Cultivator Co. v. McCanny, 80 Ga. 343.

⁴ Fitschen v. Thomas (Mont.), 22 Pac. Rep. 450; McGuire v. Joslyn, 57 Hun, 586; 31 N. Y. State Rep. 990; Reavis v. Orenshow, 105 N. C. 369; Dorsey v. Picke, 57 Hun, 580; 32 N. Y. State Rep. 258; Schmidt v. Keehn, 126 N. Y. 523; Cole v. Lake Shore & M. S. R. Co. (Mich.), 45 N. W.

Rep. 983; Bradford v. Malo, 42 Kan. 54.

⁵ Diel v. Missouri P. R. Co., 37 Mo. App. 454; Pollak v. Davidson, 87 Ala. 551.

⁶ Ville De Havre, 7 Bin. 328.

⁷ See Barber v. Lyons, 22 Barb. 62; Heath v. Waters, 40 Mich. 457; Brown v. Schock, 77 Pa. St. 471.

⁸ Winer v. Smith (Oreg.), 30 Pac. Rep. 416; Gulf Coast & S. F. R. Co. v. Bax, 81 Tex. 670; Bradley v. Walker, 44 N. Y. State Rep. 213; State v. Keith, 47 Minn. 559.

⁹ Barnett v. Glutting, 3 Ind. App. 415.

evidence. Manufacturing evidence also falls within this rule.¹ Thus, where a lapidary refuses to return a jewel given him for inspection, the law presumes that it was of the finest quality. So where A. is prevented by acts of B. from showing the quality of wool for the taking of which he brings suit, B. is liable for the value of the best quality of such goods.² The voluntary destruction of a document raises *prima facie* a presumption of fraud, and precludes the spoliator from giving secondary evidence of its contents in the absence of a legal excuse for its destruction. Thus, where the holder of a note burns it, or tears off a writing attached, he cannot prove its contents by parol.³ It would be in violation of all the principles upon which inferior and secondary evidence is tolerated to allow a party the benefit of it who has wilfully destroyed the higher and better evidence. But where the destruction was the result of mistake, accident or some fault not amounting to a fraud, there is a legal excuse.⁴

§ 12. Presumption of continuance of things.—Residence at any time being shown, there is a presumption that it still continues.⁵ In other words, a residence once established is presumed to continue until there is satisfactory evidence that it has been abandoned.⁶ Proof that land was unoccupied at a certain time creates a presumption that it continued unoccupied until a later time.⁷ So a highway shown to have existed will be presumed not to have ceased to be such.⁸ A derangement of mind shown to exist at any particular period is presumed to continue until disproved.⁹ A person shown to have been the owner of bonds will be presumed to have continued to own them in the absence of evidence to the contrary.¹⁰ Possession or ownership of either realty or personalty, non-possession or loss, debts and other conditions of property or things once

¹ Costigan v. Mohawk, etc. R. Co.
2 Denio, 600; State v. Keith, 47 Minn.
559.

² Bailey v. Show, 24 N. H. 300;
Preston v. Leighton, 6 Md. 88.

³ Price v. Tallman, 1 N. J. L. 447;
Blode v. Noland, 12 Wend. 173.

⁴ Cartier v. Troy Lumber Co., 138
Ill. 533.

⁵ Clough v. Kyne, 40 Ill. App. 234.

⁶ Batna Valley S. Bank v. Silver
City Bank (Iowa), 54 N. W. Rep. 472.

⁷ Geisinger v. Beyl, 80 Wis. 443.

⁸ Cohoes v. Delaware & H. C. Co.,
134 N. Y. 397; 47 N. Y. State Rep.
612; 46 Alb. L. J. 406.

⁹ Peters v. Peters, 52 N. Y. State Rep.
169; Armstrong v. State, 30 Fla. 170.

¹⁰ Chapman v. Taylor, 136 N. Y. 663;
49 N. Y. State Rep. 848.

proved to exist are presumed to continue until the contrary is shown.¹ So generally where a state of affairs or of matters of fact are shown once to have existed, the presumption is that they still exist.² Thus, if a partnership, agency, tenancy or other similar relation is shown to have once existed, it will be presumed to continue until it is proved to have been dissolved.³ So where it is shown that a person owned certain property prior to his death, it will be presumed to have belonged to him at the time of his death;⁴ and generally where property, either real or personal, is shown once to have belonged to a person, it will be presumed that it continues to be his until the contrary is shown.⁵ Thus, a stockholder of a corporation is presumed to continue such until the contrary is shown.⁶ Possession by defendant of property belonging to a decedent's estate is presumed to continue to the commencement of an action therefor by the administrator;⁷ and joint ownership of heirs will be presumed to continue unless the contrary be proved.⁸ So also that moneys received by a county treasurer and appropriated by law to a particular purpose, which have never been applied thereto, are still in the hands of the treasurer.⁹ But it seems that a thing once proved to exist is presumed to continue only as long as is usual with things of that nature.¹⁰ Present insolvency raises no presumption of insolvency at the time of the execution of a conveyance five years before;¹¹ and no presumption arises from the fact that a person was committed to jail in 1890, and was unable to get bail, that he continued in confinement until February, 1891.¹² When proof of a law of a foreign state has been

¹ *Re Huss*, 126 N. Y. 537; 44 Alb. L. J. 108; 37 N. Y. State Rep. 789; *Lawson, Pr. Ev.* 163; *Kidder v. Stevens*, 60 Cal. 415; *Miller v. Baumgardner*, 109 N. C. 412; *Pope v. Kansas City Cable Co.*, 99 Mo. 400; *Bell v. Anderson*, 74 Wis. 638; *Zwiler v. Storts*, 39 Mo. App. 163.

² *Geisinger v. Beyl*, 80 Wis. 443; *Fan v. Payne*, 40 Vt. 615; *Brown v. Burnham*, 28 Me. 38.

³ *Ryan v. Lains*, 12 Q. B. 460; *Cochran v. Ward*, 5 Ind. App. 89.

⁴ *Hanson v. Chatovich*, 13 Nev. 395.

⁵ *Lake Erie & W. R. Co. v. Carson*, 4 Ind. App. 185; *Harrison v. Queen's Ins. Co.*, 49 Wis. 71.

⁶ *Barron v. Paine*, 83 Me. 312.

⁷ *Murray v. Norwood*, 77 Wis. 405.

⁸ *Simon v. Richard*, 42 La. Ann. 842.

⁹ *Spaulding v. Arnold*, 125 N. Y. 194; 34 N. Y. State Rep. 980.

¹⁰ *Scott v. Wood*, 81 Cal. 398.

¹¹ *Windhaus v. Bootz*, 92 Cal. 617. And see *Crotty v. Union Mut. L. Ins. Co.*, 144 U. S. 621.

¹² *State v. Williams*, 35 S. C. 160.

given from a publication made under governmental authority, the rules and principles of evidence entitle it to be considered as the existing law of the land in the absence of some equally good evidence that it has been changed or repealed.¹ It may be observed that the very notion of a law, as furnishing a rule of government or of conduct, suggests permanence as a characteristic and does not involve the idea of change.

§ 13. **Domicile, residence, solvency, infancy, partnership.**—Mr. Lawson, in his work on Presumptive Evidence,² says: "Domicile, residence or non-residence, solvency or insolvency, infancy, partnership, the holding of an office, authority to do an act, and other relations or conditions of persons or things, once shown to exist, are presumed to continue until the contrary is proved." But presumptions of continuance never run backward.³ Thus, proof of present insolvency raises no presumption of insolvency five years ago. So proof that the relation of debtor and creditor existed between two parties at one date is not proof that months thereafter the same relation and the same amount subsisted.⁴ But proof that a certain relation existed between parties at a certain times raises a presumption that such relation still continues. And it is upon this principle that, where a person is shown to have permitted a servant or child to order goods upon his credit upon several occasions, he will be liable for goods so ordered after the relation has in fact been terminated, unless notice to the tradesman not to furnish them upon his credit has been given;⁵ and where it is shown that A. resided in 1880 in Indiana, the presumption is that he still resides there.⁶ So where A. is proved to be solvent on a certain day, the presumption is that he continues solvent.⁷ Where it is proved that certain persons were once partners, the presumption is that they continue to be so.⁸ So where a state of peace or war is shown to have existed in a certain country at a certain time, the presumption is that it continues;⁹ and where a

¹ Matter of Huss, 37 N. Y. State Rep. 789.

² Page 172.

³ Windhaus v. Bootz, 92 Cal. 617.

⁴ Crotty v. Union Mut. L. Ins. Co., 144 U. S. 621.

⁵ Ryan v. Lanes, 12 Q. B. 460.

⁶ Greenfield v. Camden, 74 Me. 56.

⁷ Walrod v. Ball, 9 Barb. 271; Mulen v. Prior, 12 Mo. 307.

⁸ Cooper v. Dedrick, 23 Barb. 516.

⁹ Covert v. Gray, 34 How. Pr. (N. Y.) 450.

partnership is shown to have existed at a former date, the presumption is that it still exists.¹

§ 14. Sanity or insanity.—Every person is presumed to be sane until the contrary is made to appear;² and the burden of proof is on the one who alleges the insanity of a person.³ But insanity once proved to exist is presumed to continue.⁴ Competency in business transactions is presumed unless the contrary appears by proof;⁵ and testamentary capacity is always to be presumed, and such presumptions stand until overcome.⁶ A careful analysis of the principles upon which presumptions are allowed to have force and effect will show that the proof of the insanity of an individual at a particular period does not necessarily authorize the inference of his insanity at a remote subsequent period, or even several months later.⁷

§ 15. Character and habits of persons.—Mr. Lawson, in his work on Presumptive Evidence,⁸ says: "The character and habits of a person are presumed to continue as proved to be at a time past. The opinions of individuals once entertained and expressed, and the state of the mind once proved to exist, are presumed to remain unchanged." It might be too much to say that a character when once formed is presumed to remain unchanged for life. Still the law, founded on a full knowledge and just appreciation of the general course of human affairs, indulges a strong presumption against any sudden change in the moral as well as the mental and social condition of man. When the existence of a person, a personal relation or a state of things is once established by proof, the law presumes the person, relation or state of things continues to exist as before till the contrary is shown, or till a different presumption is raised from the nature of the subject in question. It is not looking to common experience in

¹ *People v. Manhattan Co.*, 9 Wend. 351.

² *Hiatt v. Shull*, 36 W. Va. 563.

³ *Chancellor v. Donnell* (Ala.), 10 S. Rep. 910; *Jones v. Jones*, 43 N. Y. State Rep. 434; *Cropp v. Cropp*, 88 Va. 753; *Trimbo v. Trimbo*, 47 Minn. 389.

⁴ *Lawson, Pr. Ev.* 179; *State v. Lewis*, 20 Nev. 333; *State v. Davis*,

27 S. C. 609; *Green v. State*, 88 Tenn. 614.

⁵ *Reeve v. Bonville*, 5 Del. Ch. 1; *Moran v. Pelifant*, 28 Ill. App. 278.

⁶ *Newhard v. Yundt*, 132 Pa. St. 324; *Pendley v. Eaton*, 130 Ill. 69; *Ward v. Doan*, 77 Mich. 328.

⁷ *Trimbo v. Trimbo*, 47 Minn. 389.

⁸ *Page* 180.

human conduct, generally found to be true, that a thorough change from a bad to good character is wrought at once. It may, and it is to be hoped often does occur, but such is not the common course of life. On the contrary, there is a strong probability that one whose general character was bad several years since is still of doubtful or disparaged fame. So much at least may be asserted without evincing the feelings of a misanthrope, or an unseemly lack of charity.

§ 16. Presumptions not retrospective.—Where the existence of a personal relation or a state of things continuous in its nature is once established by proof, the law presumes that such *status* continues to exist as before until the contrary is proved, or until a different presumption is raised from the nature of the subject in question. But this presumption cannot operate retrospectively.¹

§ 17. Presumptions of life.—Presumptions of the death of a person will not be received until all reasonable doubt of his existence at a given time has been removed;² or, the existence of a living person being once shown, he is presumed to continue alive until a contrary presumption is raised, as love of life is presumed;³ and a person proved to have been alive at a former time is presumed to be alive at the present time,⁴ in the absence of evidence that he has not been heard from within the last seven years.⁵ Thus where, in an action tried in 1837, A. is shown to have been alive in the year 1834, the law will not infer that he is dead.

§ 18. Persons presumed to be dead when.—An absentee shown not to have been heard of for seven years by persons who, if he had been alive, would naturally have heard of him, is presumed to have been alive until the expiration of such seven years, and to have died at the end of that time.⁶

¹ *Erskine v. Davis*, 25 Ill. 251; *Windhaus v. Bootz*, 92 Cal. 617; *Murdock v. State*, 68 Ala. 567.

² *Smith v. Combs*, 49 N. J. Eq. 420.

³ *Illinois Cent. R. Co. v. Cragan*, 71 Ill. 184.

⁴ *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Lowe v. Foulke*, 103 Ill. 58.

⁵ *Letts v. Brooks*, Hill & Denio Supp. 36.

⁶ *Re Rhodes' Estate*, 10 Pa. Co. Ct. Rep. 386; *Waite v. Coaracy*, 45 Minn. 159; *Re Keele's Estate* (Pa.), 30 W. N. C. 419; *Hoyt v. Newbold*, 45 N. J. L. 219; *Youngs v. Heffner*, 36 Ohio, 232; *Forsaith v. Clark*, 21 N. H. 424; *Spears v. Barton*, 31 Miss. 554. But see *Wood's Pr. Ev.* 184.

The full period must have elapsed, even though it is shown that the person was in feeble health when he left the neighborhood, or was very aged.¹

§ 19. **Absentees — Who are.**— Mr. Lawson, in his work on Presumptive Evidence,² says: "An absentee is one who has left his residence, home or domicile either temporarily, intending to return, or permanently. Where the removal is temporary, absence alone, without being heard of, is sufficient to raise the presumption of death. But where it is permanent, without intention to return, the presumption does not arise until inquiry has been made at the fixed residence, home or domicile of the party."³ Such absence must be shown to have been from his last known place of residence. If a person remains beyond sea for seven years, if he had a known and fixed residence in a foreign country when he was last heard of, he is not presumed to be dead without some evidence of inquiries having been made for him at such known place of residence without success. Thus, the question is whether G. is alive. It is proved that G. has not been heard of in Mexico, N. Y., for thirty years. There is no evidence that G. ever had a residence or domicile in Mexico. There is no presumption that G. is dead.⁴

§ 20. **Not been heard of — Meaning of.**— Mr. Lawson says: "The phrase 'not been heard of' means that none of the relatives or friends of the absentee have heard anything about him which should or would raise a reasonable doubt in his or her mind that he really was no more."⁵ But persons who would naturally have heard of him is not confined to a particular class.⁶ It is not, however, sufficient to raise a presumption that a person was dead to simply inquire of people who once knew him, and who say they have not heard from him in seven years, because, if ever so much alive, those people might not have heard from him. It is necessary, in order to raise the presumption, that there should have been an in-

¹ Burney v. Ball, 24 Ga. 505.

² Page 213.

³ Wentworth v. Wentworth, 71 Me. 83; Bailey v. Bailey, 36 Mich. 185.

⁴ Garwood v. Hasings, 38 Cal. 229; Wentworth v. Wentworth, 71 Me.

83; Brown v. Jewett, 18 N. H. 230;

Stinchfield v. Emerson, 52 Me. 465;

Smith v. Smith, 49 Ala. 156.

⁵ Lawson, Pr. Ev. 216.

⁶ Wentworth v. Wentworth, 71 Me.

73; Flynn v. Coffee, 12 Allen, 193.

quiry and search made for the man among those who, if he was alive, would be likely to hear of him.

§ 21. **Absentee's residence — Meaning of.**— Mr. Lawson, in his work on Presumptive Evidence, says: "The absentee's residence, home or domicile refers to that place which he first departed from, and does not include places where he may have afterward resided or visited."¹ Thus, in *Winship v. Conner*,² the court held that where C., who resided with his wife and family in H., left there in 1843, leaving his wife and family behind, and wrote them letters from Illinois until 1849, after which he was not heard from, the presumption was that he died in 1856.

§ 22. **Presumption of death before seven years.**— Where a person takes passage on a ship or steamer, and upon arrival at port he is not to be found upon the boat, the boat not having landed during the voyage, a jury might with great propriety from this fact presume the person's death during the voyage. The burden of proving presumption founded on a reasonable probability must prevail against mere possibilities; for were it otherwise, the conclusion could never be arrived at that a man was dead until the natural limit of human life had been reached. A vessel, when absent double the longest time of a voyage, may be presumed to be lost; and it follows as a consequence that it will also be inferred that all perished with her, if none of the passengers or crew is afterwards heard of. The lapse of time makes the deaths of all on board as certain as anything not seen can be. The death of a person is upon him who sets it up;³ and if he relies upon the absence of the person for seven years without being heard from, he must establish both facts before the presumption arises. The mere fact of absence is not enough; he must show inquiries made at his last known residence abroad; or if he had none that is known to his friends, inquiries made of the persons in the place where he was last known to reside before he went abroad, and inquiries among his relatives and friends who would be most likely to hear from him if living.⁴ Where a person in a desperate state of health leaves his home for a

¹ Lawson, Pr. Ev. 222.

² 42 N. H. 344.

³ Emerson v. White, 29 N. H. 482.

⁴ Clark v. Cummings, 5 Barb. 339;
McCartee v. Camel, 1 Barb. Ch. 455.

visit to return in two months, and never returns, and is not afterwards heard of, the presumption is that he died before seven years.¹

Mr. Lawson, in his work on Presumptive Evidence, states another exception to the general rule as follows: "That if within seven years a person embarked on a vessel which has not since been heard from and is long overdue, inquiries having been made at her ports of departure and destination, the presumption is that he died before seven years.² Thus, where in January, 1857, M. sailed from Liverpool to Valparaiso, the voyage should have been made in ten weeks. In January, 1858, nothing had been heard of the vessel or its crew. The presumption is that M. is dead.³ But until inquiries have been made at the ports of departure and destination, no presumption of loss arises. Thus, in *Re Bishop*,⁴ B. in October, 1858, sailed in command of a vessel from Demerara to London, and neither B. nor the vessel was afterwards heard of; but the court held that until inquiries had been made at Demerara, there was no presumption that he was dead."

Mr. Lawson states the third exception to the rule above as follows: "That within seven years he encountered a specific peril, which includes not the ordinary dangers of travel or navigation,⁵ but some unusual or extraordinary danger.⁶ Thus, where M., who left New York for Asia in 1840, and in 1841 resided in a town in Asia, which was visited by an epidemic, and he was not heard of subsequently, it will be presumed his death occurred prior to 1847.⁷ That his habits, character, domestic relations or necessities would have made it certain that if alive within that period he would have returned to or communicated with his residence, home or domicile."⁸

¹ *Stonvenel v. Stephens*, 2 Daly, Lancaster v. Washington Life Ins. 323; *Danby v. Danby*, 5 Jur. (N. S.) Co., 62 Mo. 127.
54.

² Lawson, Pr. Ev. 223; *White v. Mann*, 26 Me. 363; *Eagle's Case*, 3 Abb. Pr. (N. Y.) 218; *Merritt v. Thompson*, 1 Hilt. (N. Y.) 550.

³ *Gerry v. Post*, 13 How. Pr. (N. Y.) 118.

⁴ 1 Sw. & Tr. 303.

⁵ *Eagle's Case*, 3 Abb. Pr. 220;

⁶ Lawson, Pr. Ev. 230.

⁷ *Learned v. Corley*, 43 Miss. 709; Lancaster v. Washington Life Ins. Co., 62 Mo. 127.

⁸ Lawson, Pr. Ev. 233; *Tisdale v. Connecticut Mut. Life Ins. Co.*, 26 Iowa, 170; *Sheldon v. Ferris*, 45 Barb. 128.

§ 23. When presumption of death after seven years does not arise.—Mr. Lawson, in his work on Presumptive Evidence, says: “The presumption of death at the expiration of seven years from being last heard of does not arise where it is improbable that the absentee, even if alive, would or could have been heard of at, or would or could have communicated with, his residence, house or domicile, or where in other judicial proceedings the absentee is recorded as having been alive subsequently to the end of the seven years.”¹ The same rule prevails where, on account of illiteracy or other reason, it is improbable that there would have been any communication.² The fact that a person was alive at a particular time is but one of the facts to be considered in determining whether he was alive at a given future date, the probative force of which will depend upon accompanying circumstances, such as length of intervening time, the age and health of the person, or any other facts affecting the probability of the continuance of his life.³ To rebut the presumption of death from absence for more than seven years, evidence that a witness had conversed with a man who informed him that the person was alive in another state, where he had seen him a short time before, is admissible, although hearsay.⁴

§ 24. Presumption of survivorship of persons who perished in the same accident.—By the civil law and in foreign countries several rules are laid down for the direction of courts in ascertaining the fact of survivorship where several persons have perished by the same calamity. But in this country the following is the general rule: There is no presumption as to the order in which two persons died, who are shown to have perished in the same accident, shipwreck or battle. The law regards them as having died at the same instant.⁵ The evidence is, from the beginning to the end, one of fact, as bearing upon which the sex, age and relative physical strength of the persons who were lost may be shown, and is generally the only evidence which can be had upon the question; and

¹ Lawson, Pr. Ev. 237.

⁴ Dowd v. Watson, 105 N. C. 472.

² Re Miller's Estate, 30 N. Y. State Rep. 212.

⁵ Cowman v. Rogers, 73 Md. 403; Cook v. Caswell, 81 Tex. 678.

³ State v. Plyn (Minn.), 45 N. W. Rep. 848.

as a rule, in the absence of any evidence upon which a finding can be based, it will be presumed that all perished at the same moment.¹ This is done not because the fact is proved, or that there is any presumption to that effect, but because there is no evidence and no presumption to the contrary.² Thus, where A. and his wife are killed in a railroad accident, there is no presumption that one survived the other.³ The same rule prevails where a father and children were lost in a shipwreck.⁴

§ 25. Where the age, health or sex may raise a presumption of survivorship.—Mr. Lawson, in his work on Presumptive Evidence, says: "Where the calamity, though common to all, consists of a series of successive events, separated from each other in point of time and character, and each likely to produce death upon the several victims, according to the degree of exposure to it, the difference in age, sex or health may raise an inference of survivorship."⁵ And the one of several in a common danger which proves fatal to all who was last seen alive within the operation of the course of death is presumed to have survived the others.⁶

§ 26. Presumptions of identity.—Identity of name of defendant with that of defendant in a judgment sued on is *prima facie* evidence of identity of person;⁷ and it is fair and legal to presume that the same name identifies the same person until the contrary appears, where there is similarity of residence or trade, or where the name is an unusual one.⁸ Thus "Louis E. Fink" and "Louis Fink" are presumptively the same person.⁹ And a check dated at a certain place and drawn upon the "First National Bank" will be presumed to have been drawn upon the First National Bank of such place,

¹ Newell v. Nichols, 75 N. Y. 78.

² Newell v. Nichols, 75 N. Y. 78.

³ Re Hall, 12 Ch. L. N. 12.

⁴ Newell v. Nichols, 12 Hun, 604; Kansas P. R. Co. v. Miller, 2 Cal. 443; Russell v. Hallett, 23 Kan. 276; Newell v. Nichols, 75 N. Y. 78.

⁵ Lawson, Pr. Ev. 246; Coye v. Leach, 8 Met. 371.

⁶ Id.

⁷ Ritchie v. Carpenter, 2 Wash. 512.

⁸ Morris v. McClery (Minn.), 46 N.

W. Rep. 238; Hamshaw v. Kline, 57

Pa. St. 397; Phillip v. Evans, 64 Mo.

17; Douglas v. Dakin, 46 Cal. 49;

Smith v. Gillum, 80 Tex. 120. But

see Ambs v. Chicago, St. P., M. & O.

R. Co., 44 Minn. 266.

⁹ Fink v. Manhattan R. Co., 29 N. Y.

State Rep. 153; Gilman v. Sheets, 78

Iowa, 499.

where it appears such bank exists.¹ But the fact that the family name and initials are the same raises no presumption that the parties are the same. Thus, there is no presumption that A. A. Loudon is Andrew A. Loudon,² or that H. V. Libhart is Henry V. Libhart.³ Where two persons of the same name occupy different positions or relations, the presumption is that they are different;⁴ and where an interest is claimed, mere identity of name with the person entitled is insufficient.⁵ Where father and son, or two persons of different ages, bear the same name, that name when used is presumed to indicate the father, or the eldest of the two, as the case may be.

PRESUMPTION OF INTENT.

§ 27. **In general.**—Where a person does an act, he is presumed in so doing to have intended that the natural and legal consequences of his act shall result.⁶ As men generally act deliberately and by the determination of their own will, the law presumes that every man always thus acts until the contrary appears. Thus, where a baker delivers adulterated bread to a public asylum, the law presumes that he intended it to be eaten. So where B. sets fire to a building, the law presumes that he intended to injure the owner. So the law presumes that where a married man goes to a house of prostitution that he committed adultery while there.⁷ So where a man makes a conveyance whose provisions prefer certain creditors, the law presumes that he intended to prefer them.⁸ Where an act is criminal *per se*, a criminal intent is presumed from the commission of the act.⁹ But it is different when a specified interest is required to make an offense.¹⁰

§ 28. **Revocation of will.**—A testator may destroy his own will at any time or in any mode or manner he pleases. Thus, if a testator cut out his own name from his will with

¹ Culver v. Marks, 122 Ind. 554.

² Loudon v. Walpole, 1 Ind. 321.

³ Bennett v. Libhart, 27 Mich. 489.

⁴ Cozzens v. Gillispie, 4 Mo. 82;

McMinn v. Whelan, 27 Cal. 300.

⁵ Jackson v. King, 5 Cow. 237;

Mooers v. Blunker, 29 N. H. 431.

⁶ State v. Doyle, 107 Mo. 36; State

v. Talmage, id. 543; Hayes v. State, 58 Ga. 47.

⁷ Evans v. Evans, 41 Cal. 103.

⁸ Beals v. Clark, 12 Gray, 18.

⁹ Carroll v. State, 23 Ala. 28; Murphy v. State, 37 id. 142; State v. Holmes, 54 Mo. 153.

¹⁰ Com. v. Drum, 58 Pa. St. 9; State v. Lane, 64 Mo. 319.

clear intent to revoke it, it is a sufficient destruction. So would drawing lines over the testator's name, *animo revocandi*, even though the signature is still legible. But whatever the means employed for defacing or destroying the will, a free and rational intention to revoke must accompany the act, or the revocation will not be valid. The mere act of canceling is nothing unless it be done *animo revocandi*. If a will is found in a testator's safe carefully preserved among his valuable papers with his signature erased, it would be a fair and reasonable presumption that he erased the signature *animo revocandi*. But if found with the signature carefully restored, no such presumption arises. The cancellation of a will does not necessarily involve its revocation. The cancellation itself is an equivocal act, and in order to operate as a revocation must be done *animo revocandi*. Mere tearing or destruction, without intention to revoke, is no revocation. If a testator is arrested in his design of destroying his will by remonstrance or interference of a third person, or by his own voluntary change of purpose, and thus leaves unfinished the work of destruction which he had commenced, the will is unrevoked; and the degree in which the attempt had been accomplished would not, it would seem, be very closely scrutinized, if the testator himself had put his own construction upon his somewhat equivocal act by subsequently treating the will as undestroyed. It may be admitted that the slightest act of cancellation, with intent to revoke absolutely, although such intent continues only a moment, is a total and perpetual revocation, and the paper can only be set up as a new will. But that is founded on the intent. When, therefore, there appears what may be called a cancellation, it becomes necessary to look to the extent of it; at all the conduct of the testator; at what he proposed doing at the time, and what he did afterwards, to satisfy the mind whether that was meant in fact as a cancellation, immediately and absolutely, or only conditionally, upon the contemplation of something else then in mind; for, although every act of cancellation imports *prima facie* that it is done, yet it is but a presumption, which may be repelled by accompanying circumstances.¹

¹ Matter of Wood, 32 N. Y. State Rep. 286.

§ 29. **When the doing of an act does not raise a presumption.**—When a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the jury as matter of fact.¹ The inquiry as to intent is far less simple than as to whether an act has been committed, because you cannot look into a man's mind to see what is passing there at any time. What he intends can only be judged of by what he does or says, and if he says nothing then his acts alone must guide.

§ 30. **A person is supposed to do what he has the right and power to do.**—It is a maxim of the law to give effect to everything which appears to have been established for a considerable length of time, and to presume that what has been done was done of right and not of wrong.²

§ 31. **Presumptions from the course of nature.**—The rule of the common law is that a child between the ages of seven and fourteen is not presumed to be *doli capax*; ³ and the question whether, in committing an offense, such child, in fact, acted with intelligence and capacity is to be determined by the jury. But as a boy under fourteen years of age is legally incapable at common law of committing an assault with intent to rape, evidence is inadmissible to show that he could in fact commit the offense.⁴ Where the child is under the age of seven years, the law presumes him to be incapable of committing a crime; after the age of fourteen he is presumed to be responsible for his actions as unqualifiedly as if he were forty; but between the age of seven and fourteen no presumption of law arises, and that which is termed a malicious intent must be proved by evidence.⁵ Thus, where it is shown that a person committed a crime while under fourteen years of age, the law presumes that he was incapable of committing it.⁶ So where a wife commits a tort or crime in the presence of her

¹ *Roberts v. People*, 19 Mich. 401; *v. Reavis*, 109 N. C. 417; *Horan v. Mayher v. People*, 10 id. 212.

² *Auerbach v. Wylie*, 84 Tex. 615; *Central R. Co.*, 35 Cal. 325.

Sears v. Kings County Elev. R. Co., 156 Mass. 440; *Mosness v. German*, 3 Jansen v. Sidoal, 41 Ill. App. 279.

American Ins. Co. (Minn.), 52 N. W. 30 Am. St. Rep. 140.

Rep. 932; *Enos v. State*, 131 Ind. 560; ⁵ *Dave v. State*, 37 Ark. 262.

Kidder v. Norris, 18 N. H. 532; *Cowles* ⁶ *Com. v. Mead*, 10 Allen, 398.

husband, the presumption is that it was done under his coercion.¹ So money advanced by a parent to a child, or by a husband to his wife, is presumed to be a gift and not a loan.²

§ 32. A person is presumed to do what it is his interest to do.— It is presumed that a man has adopted or accepted an advantageous act, offer, gift, bequest, devise or conveyance, etc., until his positive disclaimer or refusal is shown.³ Thus, where a conveyance of property is made to a person, the presumption is that he accepts it if beneficial to him.⁴ So, where a debtor delivers money to his creditor, the presumption is that it was so delivered to pay a debt, not as a loan or gift. So where a debtor leaves a legacy to a creditor.⁵ So where one man hands money to another the law will not presume that this is a loan.⁶

§ 33. Presumption of payment.— Mr. Lawson, in his work on Presumptive Evidence, says: "Independent of a statute of limitations, or in the absence of one, after a lapse of twenty years the law raises a presumption of the payment of bonds, mortgages, legacies, taxes, judgments, the due execution of a trust, and the performance of a covenant."⁷ But the presumption of payment of a judgment bond does not arise until twenty years after its maturity.⁸ No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of the past age. It may be shown that the plaintiff was poor, and the debtor of undoubted solvency during the period which has elapsed since the debt matured; and in the absence of any demand or recognition of the debt, partial payment is a persuasive circumstance, and may, when

¹ Marshall v. Oakes, 51 Me. 309.

² Ward v. Ward, 36 Ark. 586.

³ Marston v. Butler, 3 Wend. 149.

⁴ Davis v. Garritt, 91 Tenn. 147; Higham v. Stewart, 38 Mich. 513; Tibballs v. Jacob, 31 Conn. 428; Rugles v. Lawson, 13 Johns. 285; Treat v. Treat, 35 Conn. 210.

⁵ Cloud v. Clinkinbeard, 48 Am. Dec. 397.

⁶ Gerding v. Walter, 29 Mo. 426.

⁷ Nobles v. Hogg, 36 S. C. 322; Lawson, Pr. Ev. 308; Taylor v. Dugger, 66 Ala. 444.

⁸ Finfrock v. Kohl, 9 Lans L. Rev. 313; Knight v. McKinney, 84 Me. 107.

slightly corroborated, be sufficient evidence of payment.¹ The payment of a subsequent debt always raises the presumption that prior debts have been paid.² From the circumstance that a promissory note is given by one person to another, it will be presumed that the payee was not at that time indebted to the maker,³ and that all claims in favor of the maker against the payee were adjusted at that time.⁴ The presumption of the payment of a judgment of a court of record after twenty years is limited to judgments for the payment of money, and does not apply to judgments for the recovery of possession of land;⁵ and the fact that the plaintiff has neglected to enforce his judgment by writ of possession for more than twenty years does not raise the presumption that the judgment has been satisfied.⁶

§ 34. **Other than by lapse of time.**—The maker's possession of a past-due note and its production by him at the trial makes a *prima facie*, but not a conclusive, case of payment.⁷ And the general rule is that, where an order for the payment of money or the delivery of goods is found in the hands of the drawee, or a promissory note in the possession of the maker, a legal presumption is raised that he has paid the money due upon it or delivered the goods ordered. Where bills of exchange, checks, orders for the payment of money or goods, promissory notes or other obligations are paid, they, as a general rule, go into the hands of the person paying them. It is to be presumed that a man paying a written obligation will take it into his possession. Thus, a presumption of payment other than by lapse of time will arise from the production of a receipt from the creditor;⁸ from the possession by the debtor of the security or obligation, or from its cancellation; from the payment of a later debt; from the passing of money between the debtor and creditor after the

¹ Briggs' Appeal, 93 Pa. St. 485.

² Matthews v. Light, 40 Me. 394; Webb v. Lees, 149 Pa. St. 13; Smith v. Tucker, 2 E. D. Smith, 193; Gilbert on Ev. 157; Boyd v. Foot, 5 Bosw. 110.

³ Gould v. Chase, 16 Johns. 226.

⁴ Lake v. Tysen, 6 N. Y. 461.

⁵ Van Rensselaer v. Wright, 121 N. Y. 626; 31 N. Y. State Rep. 897.

⁶ Van Rensselaer v. Shaffer, 31 N. Y. State Rep. 899; 121 N. Y. 712.

⁷ Stephenson v. Richards, 45 Mo. App. 544; Emerson v. Mills, 83 Tex. 385; Bunn v. Third Nat. Bank, 38 Ill. App. 76.

⁸ Cable v. Foley, 45 Minn. 421.

debt is due,¹ or from other circumstances raising an inference of payment.² But the presumption of payment is only *prima facie*.³ Where a receipt for the last instalment of a debt is produced, the presumption is that all former instalments of the same debt are paid.⁴ So where A. gives B. a promissory note, the presumption is that B. was not at that time indebted to A.;⁵ but such presumption may be rebutted.⁶

¹ Lowrey v. Robinson, 141 Pa. St. 189.

² First National Bank v. McManigle, 69 Pa. St. 156; Pope v. Dodson, 58 Ill. 360; Carson v. Lineberger, 70 N. C. 173.

³ Parks v. Smith, 155 Mass. 26.

⁴ Crompton v. Pratt, 105 Mass. 255; Hodgdon v. Wright, 36 Me. 337.

⁵ Detreest v. Bloomingdale, 5 Denio, 304.

⁶ Halfin v. Winkleman, 83 Tex. 165; Emerson v. Mills, id. 385.

CHAPTER XVIII.

PRESUMPTIVE EVIDENCE (CONTINUED).

I. FOREIGN LAWS.

- § 1. Presumed to be the same as the laws of the forum.
2. Acts *malum in se*.
3. When there is no presumption that the common law is in force in a state or country.
4. The term "law" does not include the statute law of the forum.

II. PRESUMPTION AS TO ALTERATION OF INSTRUMENT.

5. Alteration presumed to have been made before execution.
6. When party offering an altered paper must explain it.

III. AS TO RECEIPT OF LETTERS.

IV. AGENCY — AUTHORITY.

V. AS TO DELIVERY OF DEED, ETC.

VI. PRESUMPTION FROM POSSESSION AND LAPSE OF TIME.

7. Lawful origin presumed from possession.
8. Legal title presumed from possession.

VII. INNOCENCE — PRESUMPTIONS IN FAVOR OF.

9. In general.
10. Absence of motive.
11. Good character of party accused.
12. *Alibi*.

VIII. WHAT THE PROSECUTION MUST ESTABLISH.

- § 13. In general.
14. *Corpus delicti*.
15. Discovery of the body in case of murder.
16. Cause of death.
17. Infanticide.

IX. PRESUMPTION OF GUILT.

18. In general.
19. Motive.
20. From attempt or preparation to accomplish the same crime at another time.
21. From threats or expressions of ill-will.
22. From recent possession of the fruits of the crime.
23. Unexplained suspicious appearances.
24. From attempts to stifle investigation.
25. Concealment, disguise, flight, etc.
26. From silence of accused when charged with the crime.
27. Spoliation of evidence.
28. Affectation of grief and fabrication of evidence.
29. Proof of identity of the person or thing.

X. PRESUMPTIONS AGAINST CRIME.

I. FOREIGN LAWS.

§ 1. Presumed to be the same as the laws of the forum.— As a general rule courts will presume that the law of the place where the contract was made or was to be performed is

identical with the law of the forum;¹ and where in one state or country the law of another state or country is the subject of inquiry, the law of the forum will be presumed to be the law of the foreign state or country.² As a general rule courts will not take judicial notice of the laws of another country, but they must be alleged and proved as facts.³ But the rule is not without qualification. In the absence of all proof to the contrary, the common law is presumed to prevail in the states of the Union; and on a common-law question the courts of one state will assume that the common law is in force in a sister state⁴ and in Canada.⁵ If there is any evidence that the law of a foreign state is different from that of the forum, it cannot be presumed that the laws of the two states are the same.⁶ A foreign law proved by a governmental publication is presumed to continue until the present time, in the absence of proof to the contrary;⁷ and the same rule holds good as to a municipal ordinance.⁸ When proof of a law of a foreign state has been given from a publication made under governmental authority, the rules and principles of evidence entitle it to be considered as the existing law of the land in the absence of some equally good evidence that it has been changed or repealed.⁹ It may be observed that the very notion of a law, as furnishing a rule of government or of conduct, suggests permanence as a characteristic and does not involve the idea of change.

§ 2. *Acts malum in se.*—While the general rule is that no presumption arises that the statute law of another state or

¹ *National German American Bank v. Lang*, 2 N. D. 66; *German Bank v. American F. & M. Ins. Co.*, 83 Iowa, 491; *James v. James*, 81 Tex. 373.

² *Southern Ins. Co. v. Wolverton Hardware Co. (Tex.)*, 19 S. W. Rep. 615; *Mortimer v. Marder*, 93 Cal. 172; *Meyer v. McCabe*, 73 Mo. 236; *Alford v. Baker*, 53 Ind. 279; *Evans v. Covington*, 70 Ala. 440; *Rogers v. Zook*, 86 Ind. 237; *Stokes v. Macken*, 62 Barb. 149.

³ *Lowenstein v. Salinger*, 62 Hun, 622; 42 N. Y. State Rep. 414.

⁴ *Cooper v. Standley*, 40 Mo. App. 138; *Osborn v. Blackburn*, 78 Wis. 209; *Kollock v. Emmert*, 43 Mo. App. 566; *Davis v. Chicago, R. I. & P. R. Co.*, 83 Iowa, 744.

⁵ *Jennings v. Grand Trunk R. R. Co.*, 52 Hun, 227; 23 N. Y. State Rep. 15.

⁶ *Ufford v. Spaulding*, 156 Mass. 65.

⁷ *Re Huss*, 126 N. Y. 537; 44 Alb. L. J. 108; 37 N. Y. State Rep. 789.

⁸ *Hanna v. Kankakee*, 34 Ill. App. 186.

⁹ *Matter of Huss*, 37 N. Y. State Rep. 789.

country is the same as that of a state in which a question depending thereon is raised,¹ yet robbery, larceny and other acts *malum in se*, which are criminal offenses by the common law, will in one state be presumed to be crimes in another.²

§ 3. When there is no presumption that the common law is in force in a state or country.—There is no presumption that the common law is in force in a state or country which has never been subject to the common law of England, or in a tribe or nation uncivilized.³ The presumption can only be indulged with reference to those states which, prior to their becoming members of the Union, were subject to the laws of England; and no such presumption can apply to states in which a government already existed at the time of their accession to this country, as Florida, Louisiana and Texas. With them there is no more presumption of the existence of the common law than there is of any other law. They were independent of the English law in their origin, and hence no presumption of the common law of England can be indulged in.⁴

§ 4. The term "law" does not include the statute law of the forum.—As a general rule in commercial transactions, the law of another state is presumed to be the same as the law of the forum.⁵ Thus, in every state the presumption is that in every other state three days of grace is allowed on bills of exchange and promissory notes.⁶ But when we introduce what we know to be a new law, it would be a perversion of reason to pretend to infer that as soon as we placed the new law on our statute books every other state in the Union would adopt the same law.⁷

II. PRESUMPTION AS TO ALTERATION OF INSTRUMENT.

§ 5. Alteration presumed to have been made before execution.—The legal presumption is that an alteration in an instrument was made prior to or at the time it was delivered.⁸

¹ Yeaton v. Eagle Oil & Ref. Co., 4 Rep. 73; Leavenworth v. Brockway, Wash. 183.

2 Hill, 201; Bemis v. McKenzie, 13

² Cluff v. Mutual Benefit Life Ins. Co., 13 Allen, 308.

6 Wood v. Carl, 4 Metc. 203.

³ Mortimer v. Marder, 93 Cal. 172. But see James v. James, 81 Tex. 373.

⁷ Yeaton v. Eagle Oil & Ref. Co., 4 Wash. 183.

⁴ Mortimer v. Marder, 93 Cal. 172.

⁸ Stillwell v. Patton, 108 Mo. 352.

⁵ Dickerson v. Matheson, 50 Fed.

As a general rule, erasures and interlineations appearing on the face of writings are presumed to have been made before their delivery.¹ And an alteration apparent on the face of a writing raises no presumption that it was made after delivery and without authority, and the burden is not upon the party offering it in evidence to explain the alteration.² Interlineations and erasures from a will in the handwriting of testatrix will be presumed to have been made by her in the preparation of the will, and prior to its execution, where she was her own scrivener and custodian of the will.³ But on the production of an instrument, if it appears to have been altered it is incumbent on the party offering it in evidence to explain its appearance;⁴ and the legal presumption in favor of innocence does not extend to alterations of negotiable instruments.⁵

§ 6. When party offering an altered paper must explain it.—He who takes a blemished bill or note takes it with its imperfection on its head. He becomes sponsor for it and though he may act honestly he acts negligently. It was his fault to take such a note. As notes and bills were intended for negotiation, and as payees do not usually receive them when clogged with impediments to their circulation, there is a presumption that such instrument starts fair and untarnished, which stands until it is repelled; and a holder ought therefore to explain why he took it branded with marks of suspicion; and therefore the rule is that where the alteration is in a different handwriting from the rest of the instrument or in a different ink, or is in the interest of the party setting it up, or is suspicious on its face, the burden of proof rests on the party producing the instrument to explain it to the satisfaction of the tribunal.⁶

¹ *Miliken v. Martin*, 66 Ill. 13; *Rodriguez v. Hayes*, 76 Tex. 225; *Brand v. Johnrouk*, 60 Mich. 210; *Re Wood's Will*, 32 N. Y. State Rep. 286 (1889); *Tatum v. Calamore*, 16 Q. B. 745.

² *Hagan v. Merchants' & B. Ins. Co.*, 81 Iowa, 321; *Franklin v. Baker*, 48 Ohio St. 296; 29 Am. St. Rep. 547; *Montgomery v. Crosthwait*, 90 Ala. 553; *Potter v. Kennedy*, 81 Iowa, 96;

Conable v. Keeney, 61 Hun, 624; 40 N. Y. State Rep. 939.

³ *Re Potter's Will*, 33 N. Y. State Rep. 936 (1890); *Re Holmes' Will*, 32 id. 902 (1890).

⁴ *Rodriguez v. Hayes*, 76 Tex. 225; *Wilson v. Hotchkiss*, 81 Mich. 172.

⁵ *Hess' Appeal*, 131 Pa. St. 31.

⁶ *Tillou v. Clinton Ins. Co.*, 7 Barb. 568; *Croft v. White*, 36 Miss. 455; *Lawson*, Pr. Ev. 389.

III. AS TO RECEIPT OF LETTERS.

It is presumed that a letter properly directed and proved to have been put into the postoffice, or delivered to the postman, reached its destination at the regular time and was received by the person to whom it was addressed,¹ if the party to whom the letter is addressed resides in the city or town to which the letter is addressed.² But such presumption is one of fact and is not conclusive.³

IV. AUTHORITY, AGENCY.

An attorney who acts as such in a suit is presumed to have been employed.⁴ If goods purchased by a wife extend to matters affecting the household of which she is generally in charge, the presumption is that she had authority from the husband for the purchase.⁵ The acts of a general agent in exacting an illegal rate of interest on making a loan of his principal's money are presumed authorized.⁶ But the authority of a special agent is never presumed.⁷

V. AS TO DELIVERY OF DEED, ETC.

The signing of a deed by a grantor and its possession by the grantee constitute *prima facie* evidence of delivery;⁸ so does the recording of a deed,⁹ and delivery will be presumed from its being found among the grantee's papers after his death.¹⁰ It will be presumed that it was delivered on the day of its date,¹¹ and that the parties intended it to have legal effect as an absolute conveyance.¹² The assent of minor grantees to the delivery of a deed manifestly to their advantage is

¹ Schutz v. Jordan, 141 U. S. 213; ⁵ Sauter v. Scrutchfield, 28 Mo. Benedict v. Grand Lodge A. O. U. App. 150.
W., 48 Minn. 471; De Jarnette v. ⁶ Stein v. Swenson, 44 Minn. 218.
McDaniel, 93 Ala. 215; Van Doren v. ⁷ Gulf Coast & S. F. R. Co. v. Reed, 80 Tex. 362.
Liebman, 34 N. Y. State Rep. 752 (1893). ⁸ Devereux v. McMahon, 108 N. C. 134.

² Henderson v. Carbondale Coal, etc. Co., 140 U. S. 25; Phoenix Ins. Co. v. Pitkle, 3 Ind. App. 332. ⁹ Heil v. Ridden, 45 Kan. 562.
³ Buehler v. Galt, 35 Ill. App. 225; ¹⁰ Allen v. De Groodt, 105 Mo. 442.
Home Ins. Co. v. Marple, 1 Ind. App. 411. ¹¹ Faulkner v. Adams, 126 Ind. 459;
Abel v. Brewster, 58 Hun, 605; 34 N. Y. State Rep. 402.

⁴ Shain v. Forbes, 82 Cal. 577.

¹² McLean v. Ellis, 79 Tex. 388.

presumed;¹ but such presumption will not arise so long as he is ignorant of the conveyance.² The presumption that a deed was delivered at or before the time it was put on record is not conclusive, and may be overcome by evidence that it was not delivered until later.³

VI. PRESUMPTION FROM POSSESSION AND LAPSE OF TIME.

§ 7. **Lawful origin presumed from possession.**—Mr. Lawson, in his work on Presumptive Evidence, says: "Where it appears that any person has for a long period of time exercised any proprietary right which might have had a lawful origin by grant or license from the public or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested if it had not had a lawful origin, the presumption arises that such right had a lawful origin, and that it was created by a proper instrument which has been lost."⁴ Mere proof of possession is *prima facie* proof of ownership.⁵ This applies both to personal and real estate, and the possession of the latter raises a presumption of a seisin in fee; and in the case of a mere trespasser this presumption is conclusive.⁶ It is well settled that prior actual possession of chattels, without title, is good as against a trespasser who has no better right;⁷ and in an action either of trover or trespass for chattels, it is sufficient if the plaintiff, as against the defendant, has the better right to the possession of the property, although he has no actual title thereto;⁸ and a grant of an incorporeal right may be presumed from its exercise for a period equal to that fixed by the statute of limitation;⁹ but the circumstances of its enjoyment must be carefully looked to.¹⁰

¹ Sneathen v. Sneathen, 104 Mo. 201.

² Moore v. Flynn, 135 Ill. 74.

³ Kraemer v. Adelsberger, 122 N. Y. 467; 34 N. Y. State Rep. 24.

⁴ Lawson. Pr. Ev. 403; Warner v. Henby, 47 Pa. St. 187; Fritz v. Brandon, 78 id. 342; Wilson v. Glenn, 68 Ala. 383; Hanford v. Fitch, 41 Conn. 486; Frantz v. Ireland, 66 Barb. 383.

⁵ Bagley v. Kennedy, 85 Ga. 703.

⁶ McInery v. Irvin, 90 Ala. 275; Moore v. Chicago, M. & St. P. R. Co., 78 Wis. 120.

⁷ Cook v. Patterson, 35 Ala. 102.

⁸ Fairbanks v. Philip, 22 Pick. 535; Clark v. Draper, 19 N. H. 418; Ames v. Palmer, 42 Me. 197.

⁹ Bass v. Gregory, L. R. 25 Q. B. D. 481.

¹⁰ Tilbury v. Silva (C. A.), 45 Ch. D. 98.

§ 8. **Legal title presumed from possession when.**—In most of the states of the United States there is a disposition to fix a period beyond which human transactions shall not be open to judicial investigation. Mr. Lawson, in his work on Presumptive Evidence, says: "When a person is in possession of property and is shown entitled to the beneficial ownership thereof, the presumption is that every instrument has been executed, and everything has been done to render his title legal."¹ The value of the presumption of title arising from possession depends largely upon proof of uninterrupted enjoyment for a long time.² But possession of land under claim of ownership is *prima facie* evidence of title in the occupant.³ Possession is not presumed in plaintiff in a bill *quia timet*, but must be affirmatively alleged and proved.⁴ Possession of personal property is *prima facie* evidence of ownership.⁵ Thus, the possession of a negotiable instrument by the payee thereof or his representatives is *prima facie* evidence of ownership.⁶

VII. INNOCENCE — PRESUMPTIONS IN FAVOR OF.

§ 9. **In general.**—The presumption of innocence is not a mere phrase without meaning; it is in the nature of evidence for the defendant; it is as irresistible as the heavens till overcome; it hovers over the prisoner as a guardian angel throughout the trial; it goes with every part and parcel of the evidence. Where the facts of a case are consistent both with honesty and dishonesty, a judicial tribunal will adopt the construction in favor of innocence.⁷ To make out the guilt of a person charged with crime, the prosecution is required to prove every

¹ Lawson, Pr. Ev. 419; Den v. Gaston, 25 N. J. L. 615.

² Jackson v. Harder, 4 Johns. 202; Metler v. Miller, 129 Ill. 630; Heller v. Peters, 140 Pa. St. 648; Walker v. Caradine, 78 Tex. 489.

³ Doherty v. Matsell, 119 N. Y. 646; Salazar v. Longwell (N. M.), 25 Pac. Rep. 927; Bagley v. Kennedy, 85 Ga. 703.

⁴ Livingston v. Hall, 73 Md. 386; Bullock v. Rouse, 81 Cal. 590; Brown v. Roberts, 75 Tex. 103; Bowen v.

Swander, 121 Ind. 164; Tabor v. Judd, 62 N. H. 288.

⁵ Lowry v. Hatley, 30 Ill. App. 297; Crawford v. Kindbrough, 76 Ga. 299; Abercrombie v. Stillman, 77 Tex. 589.

⁶ Bobb v. Letcher, 30 Mo. App. 43; Hunter v. Harris, 24 Ill. App. 637; Steeds v. Steeds, L. R. 22 Q. B. D. 537; 41 Alb. L. J. 27.

⁷ Greenwood v. Lowe, 7 La. Ann. 197.

material allegation and every ingredient of the crime. Until this is done the accused is presumed innocent.¹

§ 10. **Absence of motive.**— Since an action without a motive would be an effect without a cause, a presumption is consequently created in favor of innocence from the absence of all apparent inducements to the commission of the imputed offense. But the investigation of human motives is often a matter of great difficulty, from their latency or remoteness; and experience shows that aggravated crimes are sometimes committed from very slight causes, and occasionally even without any apparent or discoverable motive. This particular presumption would, therefore, seem to be applicable only to cases where the guilt of the individual is involved in doubt; and the consideration for the jury in general is rather whether, upon the other parts of the evidence, the party accused has committed the crime, than whether he had any adequate motive. The *prima facie* presumption in favor of innocence, from the absence of all apparent motive, is greatly strengthened where all inducement to the commission of the imputed crime is opposed by strong counteracting motives; as where a party indicted for arson with intent to defraud an insurance office had furniture on the premises worth more than the amount of his insurance;² or where a party accused of murder had a direct interest in the continuance of the life of the party supposed to have been murdered.

§ 11. **Good character of party accused.**— Since falsehood, concealment, flight and other like actions are generally regarded as indicatives of conscious guilt, it naturally follows that the absence of these marks of mental emotion, and still more a voluntary surrender to justice, when the party had the opportunity of concealment or flight, must be considered as leading to the opposite presumption, and these considerations are frequently urged with just effect as indicative of innocence; but the force of the latter circumstance may be weakened by the consideration that the party has been the object of diligent pursuit. In forming a judgment of criminal intention, evidence that the party have previously borne a good character is often highly important, and, if the case

¹ Farley v. State, 127 Ind. 419; ² Rex v. Bingham Horsham Spr. Ass'n, 1811.
Gibson v. State, 89 Ala. 121.

hangs in even balance, should make it preponderate in his favor. But if the evidence of guilt be complete and convincing, testimony of previous good character cannot and ought not to avail.

§ 12. *Alibi*.—Of all kinds of exculpatory evidence, that of an *alibi*, if clearly established by unsuspected testimony, is the most satisfactory and conclusive. While the foregoing considerations are more or less of an argumentative and inconclusive character, this defense, if the element of time be definitely and conclusively fixed, and the accused be shown to have been at some other place at the time, is absolutely incompatible with and exclusive of the possibility of the truth of the charge. The credibility of an *alibi* is greatly strengthened if it be set up at the moment when the accusation is first made, and be consistently maintained throughout the subsequent proceedings. On the other hand, it is a material circumstance to lessen the weight of this defense if be not resorted to until some time after the charge has been made, or if nothing happened immediately after the transaction to lead the witnesses to watch so as to be accurate in the hour or time to which they speak, even supposing them to depose under no improper bias or influence.

VIII. WHAT THE PROSECUTION MUST ESTABLISH.

§ 13. *In general*.—Every allegation of the commission of legal crime involves the establishment of two distinct propositions, namely: that an act has been committed from which legal responsibility arises, and that the guilt of such an act attaches to a particular individual, though the evidence is not always separable into distinct parts, or applicable to each of those propositions. Such a complication of difficulties occasionally attends the proof of crime, and so many cases have occurred of convictions of alleged offenses which have never existed, that it is a fundamental and inflexible rule of legal procedure, of universal obligation, that no person shall be required to answer, or be involved in the consequences of guilt, without satisfactory proof of the *corpus delicti*, either by direct evidence or by cogent and irresistible grounds of presumption.¹ If it be objected that vigorous proof of the *corpus*

¹ *Rex v. Burdette*, 4 B. & Ald. 23.

delicti is sometimes unattainable, and that the effect of exacting it must be that crimes will occasionally pass unpunished, it must be admitted that such may possibly be the result; but it is answered that where there is no proof, or, which is the same thing, no sufficient legal proof, of crime, there can be no legal criminality. In penal jurisdiction there can be no middle term; the party must be absolutely and unconditionally guilty or not guilty. Not under any circumstances can considerations of supposed expediency ever supersede the immutable obligations of justice; and occasional immunity of crime is an evil of far less magnitude than the punishment of the innocent.

§ 14. **Corpus delicti.**—The clearest principles of justice require that, whatever the nature of the crime, the amount of the intensity of the proof shall in all cases be such as to produce the full assurance of moral certainty. But it is clearly established that it is not necessary that the *corpus delicti* should be proved by direct and positive evidence. Crimes, and especially those of the worst kinds, are naturally committed at chosen times and in darkness and secrecy, and human tribunals must act upon such indications as the circumstances of the case present or admit, or society must be broken up. Nor is it very often that adequate evidence is not afforded by the attendant and surrounding facts to remove all mystery, and to afford such a reasonable degree of certainty as men are daily accustomed to regard as sufficient in the most important concerns of life; to expect more would be equally needless and absurd.

§ 15. **Discovery of the body in case of murder.**—The discovery of the body necessarily affords the best evidence of the fact of death, and of the identity of the individual, and most frequently also of the cause of death. A conviction for murder is therefore never allowed to take place unless the body has been found, or there is equivalent proof of death by circumstantial evidence leading directly to that result, and many cases have shown the danger of a contrary practice. But nevertheless, to require the discovery of the body in all cases would be unreasonable and lead to absurdity and injustice, and it is indeed frequently rendered impossible by the act of the offender himself. But nevertheless it is not necessary

that the remains should be identified by direct and positive evidence, where such proof is impracticable, and especially if it has been rendered so by the act of the party accused.

§ 16. **Cause of death.**—In the proof of criminal homicide the true cause of death must be clearly established. And the possibility of accounting for the event by self-inflicted violence, accidental or natural cause excluded, and only when it has been irrefragably proved that no other hypothesis will explain all the conditions of the case, can it be safely and justly concluded that it has been caused by intentional injury. But in accordance with the principles which govern the proof of every other element of the *corpus delicti*, it is not necessary that the cause of death should be verified by direct and positive evidence; it is sufficient if it be proved by circumstantial evidence which produces a moral conviction in the minds of the jury equivalent to that which is the result of positive and direct evidence. The possession of poisonous matter by the party charged with the administration of it is always an important fact, and when death has been caused by poison of the same kind, and no satisfactory explanation of that fact is given by the accused or suggested by the surrounding circumstances, a strong inference of guilt may be created against the accused; especially if he has attempted to account for such possession by false statements. Not only must it appear that the accused possessed the deadly poison, but it is indispensable to show that he had the opportunity of administering it.

§ 17. **Infanticide.**—Of the various forms of criminal homicide, that of infanticide, by which it is popularly understood the murder of a recently-born infant for the purpose of concealing its birth, perhaps presents the greatest difficulties in the establishment of the *corpus delicti*. In addition to the sources of difficulty and fallacy which are incidental to charges of homicide in general, there are many circumstances of embarrassment peculiar to cases of this nature, amongst which may be mentioned the occasional uncertainty and inconclusiveness of symptoms of pregnancy, the fundamental fact to be proved, which may resemble and be mistaken for appearances caused by obstructions or spurious gravidity. It must be clearly shown that a child has been born alive, and ac-

quired an independent circulation and existence; it is not enough that it has breathed in the course of its birth; but if a child has been wholly born and is alive, and has acquired an independent circulation, it is not material that it is still connected with its mother by the umbilical cord, nor is it essential that it should have breathed at the time it was killed, as many children are born alive and yet do not breathe for some time after birth.¹ Whether a child has been born alive or not is frequently a question of considerable difficulty; and it is an admonitory consideration that scientific tests which have been considered as infallible with the advance of knowledge have been found to be fallacious. Such is the case with respect to the hydrostatic test, from the indications of which in former times many women have suffered the last penalty of the law.

IX. PRESUMPTION OF GUILT.

§ 18. *In general.*—There must have existed inducements to guilt, preparations for, and objects and instruments of crime; these, the acts of disguise, flight or concealment, the possession of plunder or other fruits of crime, and innumerable other particulars connected with individual conduct and with moral, social and physical relations, afford material for the determination of the judgment. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. All the acts of the party, all things that explain or throw light on these acts, all the acts of others relative to the affair, that come to his knowledge and may influence him; his friendships and enmities, his promises, his threats, the truth of his discourses, the falsehood of his apologies, pretenses and explanations; his looks, his speech, his silence where he was called to speak,—everything which tends to establish the connection between all these particulars, every circumstance, precedent, concomitant, and subsequent,—become parts of circumstantial evidence. These are in matters infinite and cannot be comprehended within any rule or brought under any classification.

¹ *Rex v. Brain*, 6 C. & P. 350.

§ 19. **Motive.**—There must pre-exist a motive to every voluntary action of a rational being. Where the evidence of a crime is circumstantial, it is important to show that the prisoner had a motive with a view to establish that he is the person who committed the act. Motive is a minor auxiliary fact from which the main or primary fact of guilt may be inferred. It is proved by showing the desire of gain, the gratification of passion, or the preservation of reputation, accomplished or attempted or able to be accomplished by the perpetration of the crime charged. There is no motive which to the mind of an honest man can be adequate to the commission of crime, and just in proportion as the mind is debased and immoral, to that extent the motive may be less which induces the criminal act. The common inducements to crime are the desire of revenging some real or fancied wrong; of getting rid of a rival or an obnoxious connection; of escaping from a pressure or pecuniary obligation or burden; of obtaining plunder or other coveted objects; of preserving reputation, either that of general character or the conventional reputation of profession or sex; or of gratifying some other selfish or malignant passion. It occasionally happens that actions of great enormity are committed for which no apparent motive is discoverable. A sense of injury, and long-cherished feelings of resentment, may ultimately induce a state of mind independent of self-restraint, and render their victim the sport of ungovernable impulses of passion; but the distinction is evident and just between such actions as are the consequences of a voluntary abdication of moral control, and actions committed under the overmastering power of a delusion of the imagination, which, though groundless, operates upon the mind with all the force of reality and necessity.

§ 20. **From attempt or preparations to accomplish the same crime at another time.**—Premeditated crime must necessarily be preceded not only by impelling motives but by appropriate preparations. Possession of the instruments or means of crime, under circumstances of suspicion, as of poison, coining instruments, combustible matters, picklocks, house-breaking instruments, dark-lanterns, or other destructive or criminal or suspicious weapons, materials or instruments, and many other acts of apparent preparation, are important facts

in the judicial investigation of imputed crime. But the personal character for probity and the civil station of the party are highly material in connection with facts of this kind. A medical man, for instance, in the ordinary course of his profession, has legitimate occasion for the possession of poisons, and a locksmith for the use of picklocks.

§ 21. **From threats or expressions of ill-will.**—Threats or expressions of ill-will on the part of the accused concerning the victim are relevant on the question of his guilt.¹ But evidence of such language cannot dispense with the obligation of sufficient proof of the criminal facts; for though malignant feelings may possess the mind and lead to intemperate and criminal expressions, they nevertheless may exercise but a transient influence without leading to action. It must be borne in mind, too, as in regard to the proof of language in general, that declarations may be obscure in themselves or imperfectly remembered, and that witnesses may speak without a strict and due regard to truth. Words are transient and fleeting as the wind; they are frequently the effect of sudden transport, easily misunderstood and often misreported. Mere threats often proceed from temporary irritation without deep-rooted hostility. They indicate a rash and unguarded rather than a malignant character; and the very utterance of them, as everyone well knows, tends to defeat their execution. The man who has resolved on a crime is more apt to keep his purpose to himself or to confide it to an associate under the seal of secrecy. Even the most wary, however, sometimes let their wicked purposes peep out accidentally in the freedom of companionship or the weakness of drunken confidence. When such unguarded hints, dark and apparently unmeaning at the time, coincide with the subsequent tokens of guilt, they are strong cords in the net of criminating evidence.²

§ 22. **From recent possession of the fruits of crime.**—Since the desire of dishonest gain is the impelling motive to theft and robbery, it naturally follows that the possession of the fruits of the crime recently after it has been committed affords a strong and reasonable ground for the presumption that the party in whose possession they are found was the

¹ Ward v. State, 30 Tex. App. 687. ² People v. Miller, 91 Mich. 639.

real offender, unless he can account for such possession in some way consistently with his innocence.¹ It is manifest that the force of this rule of presumption depends upon the recency of the possession as related to the crime; and that if the interval of time is considerable, the presumption is much weakened, and more especially if the goods are of such a nature as in the ordinary course of things frequently to change hands. It is obviously essential to the just application of this rule of presumption that the house or other place in which the stolen property is found should be in the exclusive possession of the prisoner. The force of this presumption is greatly increased if the fruits of a plurality of a series of thefts be found in the prisoner's possession, or if the property stolen consist of a number of miscellaneous articles, or be of an uncommon kind; or from its value or other circumstances be inconsistent with or unsuited to the station of the party. The recent possession of stolen property may sometimes be referable not to the crime of theft, but to that of having received it with a guilty knowledge of its having been stolen. The possession of stolen goods recently after the loss of them may be indicative not merely of the offense of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft. But the rule must be applied with discrimination; for the bare possession of stolen property, though recent, uncorroborated with other evidence, is sometimes fallacious and dangerous as a criterion of guilt.

§ 23. **Unexplained suspicious appearances.**—As a general rule, to which the exceptions can be but rare, it is a reasonable conclusion that an innocent party can explain suspicious or unusual appearances connected with his person, dress or conduct; and that the desire of self-preservation, if not a regard for truth, will prompt him to do so. The ingenuous and satisfactory explanation of circumstances of apparent suspicion always operates powerfully in favor of the accused, and obtains for him more ready credence than when the explanation may not be easily verified. On the other hand, the force of sus-

¹ *Rex v. Burdette*, 4 B. & Ald. 149; 834; 1 Hume's Comm. C. L. of Scotland, 555; 2 *land*, III; Best on Pres. 44. Mascardus De Prob., *ut supra*, concl.

picious circumstances is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain.

§ 24. **From attempts to stifle investigation.**— Among the most forcible of presumptive indications of guilt may be mentioned all attempts to pollute or disturb the current of truth and justice, or to prevent a fair and impartial trial by endeavors to intimidate, suborn, bribe or otherwise tamper with the prosecutor, or the witnesses, or the officers or ministers of justice; the concealment, suppression, destruction or alteration of any article of real evidence,—any of which acts, clearly brought home to the prisoner or his agents, are of the most prejudicial effect, as denoting on his part a consciousness of guilt and a desire to evade the pressure of facts tending to establish it.

§ 25. **Concealment, disguise, flight, etc.**— In the most debased persons there is an involuntary tendency to flight, except when the mind is on its guard and studiously bent upon concealment; and this law of our nature sometimes gives rise to minute and unpremeditated acts of great weight. To this head may be referred the acts of concealment, flight and other indications of mental emotion usually found in connection with guilt.¹ By the common law flight was considered so strong a presumption of guilt that in cases of treason and felony it carried the forfeiture of the party's goods, whether he were found guilty or acquitted.² These acts, in all their modifications, are indications of fear; but it would be harsh and unreasonable invariably to interpret them as indications of guilty consciousness, and greater weight has sometimes been attached to them than they have warranted. Doubtless the manly carriage of integrity always commands the respect of mankind, and all tribunals do homage to the great principles from which consistency springs; but it does not follow, because the moral courage and consistency which generally accompany the consciousness of uprightness raise a presumption of innocence that the converse is always true. Men are differently constituted as respects both animal and moral courage, and fear may spring from causes very different from that of conscious guilt; and every man is therefore

¹ Com. v. McMahon, 145 Pa. St. 413. ² Co. Litt. 375.

entitled to a candid construction of his words and actions, particularly if placed in circumstances of great and unexpected difficulty. Such are the various temperaments of men, and so rare the occurrence of the sudden arrest of a person upon the charge of a crime, that who of us can say how an innocent or guilty man ought or would be likely to act in such a case, or that he was too much or too little moved for an innocent man?

§ 26. From silence of accused when charged with crime.

A refusal on the part of a witness to answer questions on the ground that it might tend to criminate him cannot be considered as evidence against the defendant in a criminal case.¹ And an inference that the defendant admitted the truth of matters stated by the witness in a coroner's inquest cannot be drawn from his silence on such inquest.²

§ 27. Spoliation of evidence.—It is a maxim of law that *omnia præsumuntur contra spoliatores*, and the suppression or destruction of pertinent evidence is always therefore deemed a prejudicial circumstance of great weight; for, as no action of a rational being is performed without a motive, it naturally leads to the inference that such evidence, if it were produced, would operate unfavorably to the party in whose power it is to produce it, and who withholds it or has wilfully deprived himself of the power of producing it.³ Other facts of the same kind are the common cases of the obliteration, effacing or otherwise removing marks of ownership or identity from plate or linen, or other articles of property, or of stains of blood or other matter from the person or dress of the accused, or the suggestion or insinuation of false, groundless or deceptive hypotheses or explanations, in order to neutralize or account for adverse acts or appearances.

§ 28. Affectation of grief and fabrication of evidence.—The officious affectation of grief and concern as an artifice to prevent or avert suspicion, false representations as to the state of a party's health, or the utterance of obscure or mysterious predictions or allusions, the pretense of supernatural dreams, noises or other omens or intimations calculated to prepare

¹ Barnett v. Glutting, 3 Ind. App. 415; Beach v. United States, 14 Saw. 549.

² State v. Mullins, 101 Mo. 514.

³ 1 Starkie, Ev. 437.

the connections for the event of sudden death, and to diminish surprise and alarm which naturally follows such an event, the fabrication of simulated facts and appearances calculated to create alarm or otherwise to give a delusive tendency and interpretation to inculpatory facts, are artifices frequently resorted to for the avoidance, neutralization or explanation of circumstances naturally presumptive of guilt; the resort to which is of the most prejudicial criminative tendency, inasmuch as it necessarily implies an admission of their truth and a consciousness of the inculpatory effect, if uncontradicted or unexplained, of the facts which it thus seeks to divest of their natural significance

§ 29. **Proof of identity of the person or thing.**— In the investigation of every alleged crime it is fundamentally requisite to establish by direct or circumstantial evidence the identity of the individual accused as the party who committed the imputed offense. It might be concluded by persons not conversant with judicial proceedings that identification is seldom attended with serious difficulty, but such is not the case. Illustrations are numerous to show that what are supposed to be the clearest intimations of the senses are sometimes fallacious and deceptive, and some extraordinary cases have occurred of mistaken identity. Hence the particularity, and, as unreflecting persons too hastily conclude, the frivolous minuteness, of inquiry by professional advocates as to the *causa scientiæ* in cases of controverted identity, whether of persons or things. Identification is often satisfactorily inferred from the correspondence of fragments of garments, or of written or printed papers, or of other articles belonging to or found in the possession of parties charged with crime, with other portions or fragments discovered at or near the scene of the crime or otherwise related to the *corpus delicti*,¹ or by means of wounds or marks inflicted upon the person of the offender. The impressions of shoes or shoe-nails, or of other articles of apparel, or of patches, abrasions or of other peculiarities therein, discovered in the soil or clay or snow at or near the scene of a crime recently after its commission, frequently lead to the identification and conviction of the guilty parties. The presumption founded on these circumstances has been

¹ See Mascardus, *ut supra*, concl. 831.

appealed to by mankind in all ages and in inquiries of every kind, and is so obviously the dictate of reason, if not of instinct, that it would be superfluous to dwell upon its importance. To guard against error it is manifest that the recency of the discovery and comparison of the impressions relatively to the time of the occurrence of *corpus delicti* and before other persons may have resorted to the spot is of the highest importance. So the accuracy of the comparison is obviously all-important, and therefore, as a further means of guarding against take, it must be shown that the shoes were compared with mis- the footmarks before they were put on them;¹ and where the comparison had not been previously made, Mr. Justice Park desired the jury to reject the whole inquiry relating to the identification by the shoe marks.² Nor must it be overlooked that, even where the identity of foot marks has been established beyond all doubt, they may have been fabricated with the intention of diverting suspicion from the real offender, and fixing it upon an innocent party, and that in other respects this kind of evidence may lead to erroneous interpretation and inference.³

X. PRESUMPTION AGAINST CRIME.

The law of England recognizes several presumptions *juris et de jure* which create entire or partial exemption from criminal responsibility; as, that infants under the age of seven years cannot be guilty of crime; that infants above that age and under fourteen years shall be *prima facie* adjudged *doli incapax*; and that, as to certain offenses connected with physical development, minors under the age of fourteen years shall be conclusively presumed to be incapable of committing them, and that no evidence shall be admitted to the contrary.⁴ Such also is the presumption that offenses committed by the wife in the presence of her husband shall, with certain exceptions, be considered to have been committed by his coercion.⁵

¹ Reg. v. Heaton, 1 Lewin's C. C. 116.

² Rex v. Shaw, 1 Lewin's C. C. 116.

³ Reg. v. Thornton.

⁴ 1 Hale's P. C., ch. 3; 4 Bl. Comm. 2.

⁵ Ibid.

CHAPTER XIX.

DAMAGES—PRACTICE AS TO PROOF OF.

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| <p>I. MANNER OF PROVING VALUE IN ACTIONS FOR PROPERTY OR SERVICES.</p> <p>§ 1. In general.</p> <p>2. Presumption of damages.</p> <p>3. Expert evidence of value.</p> <p>4. What witnesses allowed to give opinions as to value.</p> <p>5. Illustrations.</p> <p>6. Offers made for property.</p> <p>7. Price paid — Sales.</p> <p>8. By sales or value of other property.</p> <p>9. Sum inserted in deed no evidence of value.</p> | <p>§ 10. Where there is no market value.</p> <p>11. Work, labor and services.</p> <p>12. Proof of value in actions on special contract.</p> <p>13. Benefit to premises.</p> <p>II. PECUNIARY CONDITION OF PARTY.</p> <p>14. In general.</p> <p>15. Breach of promise of marriage — Reputation of defendant's wealth.</p> <p>III. LIBEL — REPETITION OF.</p> <p>16. In general.</p> <p>17. Repetition of libel after action commenced.</p> |
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I. MANNER OF PROVING VALUE IN ACTIONS FOR PROPERTY OR SERVICES.

§ 1. **In general.**—In an action for damages it is the province of the jury to determine, upon the facts which are spread before them in evidence, whether the plaintiff has suffered and the amount of the proper compensation therefor. The rule has been long settled that, in an action for damages, witnesses are to state the facts, and are not permitted to determine anything. Their testimony must be confined to stating facts. If the loss is alleged to be a pecuniary one, and there is no evidence tending to show its extent, the jury should only be allowed to give nominal damages; but if there are any facts upon which an estimate might be made as to the amount of damage, they are the sole arbiters and must assess it. In cases where it may not be possible to reach by computation the exact figures of a right indemnity, the jury, when the

facts of the case are laid before them, may fix the amount of the damages.¹

§ 2. Presumption of damage.—An injury to reputation and feelings, constituting actual damage, is presumed from proof of publication of an article libelous *per se* and of the falsity of the statements, although no special damage is shown.² So no evidence of pecuniary loss by the deprivation of the services of a wife is essential to recovery for loss of such services by personal injury to her.³ Since damages are implied from every wrong, proof of an actual assault entitles a party to compensatory damages, without evidence of the amount of damages sustained.⁴

§ 3. Expert evidence of value.—Any ordinary witness who is acquainted with personal property and its market value may testify as to its value; but such witness cannot state his opinion as to the value of articles described to him by another person, when such description is not stated to the jury. A book-keeper of a person having charge of books attached may give an estimate of the value of the book accounts attached.⁵ So an expert may state the net value of an insurance policy forfeited for non-payment of premiums;⁶ the value of a museum destroyed by fire;⁷ the value of colts bred by certain stock horses.⁸ Damages cannot be proved by asking a witness how much a thing is or was damaged;⁹ or how much a person was damaged in his credit by a wrongful act;¹⁰ or how much injury or damage one person caused another by his refusal to complete a contract.¹¹ In an action for

¹ *Fish v. Dodge*, 4 Denio, 311; *Marcy v. Shult*, 29 N. Y. State Rep. 346; *Avery v. N. Y. C. & H. R. R. Co.*, 121 N. Y. 31; 30 N. Y. State Rep. 471.

² *Smith v. Sun P. & P. Ass'n*, 55 Fed. Rep. 240; *Alliger v. Mail P. Ass'n*, 49 N. Y. State Rep. 495; 66 Hun, 626.

³ *Kelley v. Mayberry*, 154 Pa. St. 440.

⁴ *Rose v. Louisville, N. O. & T. R. Co.*, 70 Miss. 90; *Hannon v. Gross*, 32 Pac. Rep. 787; *Bartley v. Trorlicht*, 49 Mo. App. 214.

⁵ *Freusch v. Ottenburg*, 54 Fed. Rep. 867; *Richter v. Harper*, 95 Mich. 221; *Robinson v. Pen. Plow & W. Co.*, 1 Okla. 20.

⁶ *Price v. Connecticut Mut. L. Co.*, 48 Mo. App. 281.

⁷ *Richter v. Harper*, 95 Mich. 1.

⁸ *Parker v. Lake Shore & M. S. R. Co.*, 93 Mich. 607.

⁹ *Upcher v. Oberlander*, 50 Kan. 315.

¹⁰ *Frammell v. Ramage (Ala.)*, 11 S. Rep. 916.

¹¹ *Manning v. Maas*, 50 N. Y. State Rep. 759; *Devlin v. New York*, 53

damages to abutting property from the presence of an elevated railroad in a street, testimony of experts as to the value of plaintiff's property before the road was built and its present value is competent; but the amount of damage sustained by the plaintiff, or the possible value of property if the railroad was not there, is not the subject of expert opinion.¹ But an exception to the giving of an opinion as to the amount of injury to abutting property by reason of the construction and operation of an elevated railroad in the street, on the redirect examination of a witness, is not tenable, where such an opinion is only an amplification of one called out on the cross-examination of such witness.² A passenger suing for damages for delay in delivering her trunk and its contents, whereby she was deprived of the use of her clothing for about a month, may state the value of the use of her property during the delay, since, there being no market value of such property, the opinions of witnesses familiar with the facts are admissible.³ And farmers who know the value of a shepherd dog, which is chiefly valuable for his ability to herd cattle and horses, can give their opinions as to the value, without showing that the dog had a marketable value on account of his breed or peculiar qualities.⁴

§ 4. What witnesses allowed to give opinion as to value. The opinion of an expert who has a practical knowledge of the neighborhood and its surroundings founded on actual experience and observation as to how the fee and rental values on an avenue compare with the values before the building of a railroad thereon, and how similar values compared in specified neighboring side-streets, is competent. In *Becker v. Metropolitan El. R. Co.*⁵ the court say: "There was no intention to hold evidence of value on the side-streets to be inadmissible, or to deprive the court of the right to draw the inference

id. 455; *New Mexican R. Co. v. Hendricks* (N. M.), 30 Pac. Rep. 901; *Fort Worth & D. C. R. Co. v. Word* (Tex.), 21 S. W. Rep. 607. But see *Inman v. Potter*, 18 R. I. 79; *Gerber v. Metropolitan El. R. Co.*, 52 N. Y. State Rep. 444; *Seattle & M. R. Co. v. Gilchrist*, 4 Wash. 509.

¹ *Sixth Ave. R. Co. v. Metropolitan* 726.

El. Co., 138 N. Y. 548; 53 N. Y. State Rep. 181.

² *Bischoff v. New York El. Co.*, 52 N. Y. State Rep. 372; 138 N. Y. 257.

³ *Gulf, C. & S. F. R. Co. v. Vancil* (Tex.), 21 S. W. Rep. 303.

⁴ *Bowers v. Horan*, 93 Mich. 420.

⁵ 131 N. Y. 511; 43 N. Y. State Rep.

from it, together with other evidence in the case, that the property of plaintiff had been damaged by being deprived of a greater increase in value by reason of the building of such a structure.”¹ It is improper to allow a real-estate agent, called as an expert, in an action for injuries to premises by loss of light, air, etc., by reason of the erection and operation of a structure and business near it, to state to what extent in his judgment the value of the property was damaged, if at all, by the presence of the structure. It is also improper to allow him to state what he estimated the rental value of the property to be, “the structure not being there.”² So it is improper to allow an expert to testify what in his judgment the property would be worth without the structure where it is;³ and it is also improper to allow an expert to testify as to the value of the lots, if there were no interference with the light, air and access.⁴ But in an action against an elevated railroad for injuries to adjoining property, evidence that the value of the land on the street in question has not increased in the same proportion as land on the side-streets is admissible, and may be considered upon the question of fact whether the land of the owner has increased in value to the same extent that it would have done but for the presence of the road.⁵ And while it seems that a witness is incompetent to testify as to what would be the value of the property if certain things did not exist, in order to make such witness incompetent to so testify it must be specifically objected that the opinion of the witness is inadmissible on the subject. Such evidence should not be excluded on the ground that it is immaterial or incompetent, or that the question is hypothetical. The proper objection would be that the question calls for what the judge is to determine on the other testimony.⁶

§ 5. Illustrations.—(1) Value is a matter of opinion, to be proved by persons acquainted therewith.⁷ Thus, the opin-

¹ Gerber v. Metropolitan El. R. Co. et al., 52 N. Y. State Rep. 444.

² Roberts v. New York El. R. Co., 128 N. Y. 455; 40 N. Y. State Rep. 454.

³ Doyle v. Manhattan R. Co., 128 N. Y. 488.

⁴ Gray v. Manhattan R. Co., 128 N. Y. 499.

⁵ Becker v. Metropolitan R. Co., 131 N. Y. 509; 43 N. Y. State Rep. 726.

⁶ Roosevelt v. New York El. R. Co., 57 N. Y. Super. Ct. 438; 29 N. Y. State Rep. 266; McGean v. Manhattan Ry. Co., 117 N. Y. 219.

⁷ Missouri F. C. Works v. Ellison, 30 Mo. App. 67.

ion of a person properly informed as to the value of other articles of the same kind is admissible as to the value of an article which has no market value.¹ After a witness has testified that he knows the property and its value, he may be called upon to state such value.² But the opinion of a witness as to the market value of ice cut and stored for sale is inadmissible on the question of the value of the ice not cut, which has no market value.³

(2) A person who has kept the expense account of the family for several years is competent to give an opinion as to the expense of the family at that time.⁴

(3) A witness may state that he had never seen a machine which did not do better work.⁵

(4) Testimony as to the value of property, where neither question or answer confines it to any particular place, is improper.⁶

(5) Before a witness can testify to the value of services, it must appear that he knew the usual rate paid for like services at the time and place.⁷ Thus, an attorney is competent to testify to the value of his own services;⁸ carpenters may testify as to the value of the services of boys employed in aid of carpenter's work;⁹ physician's services may be proved by other physicians;¹⁰ and the value of logs by a workman in a saw-mill.¹¹

(6) A witness may give his opinion of the value of a franchise to build a wharf, based upon his own experience under a similar franchise;¹² and an insured may give an opinion of the loss to insured property, where he has actual knowledge of the cost and value of the insured property.¹³

¹ Sullivan v. Lear, 23 Fla. 463.

² Montana R. Co. v. Warren, 137 U. S. 348; Moore v. Chicago, M. & St. Paul R. Co., 78 Wis. 120; Butler v. Howell (Colo.), 25 Pac. Rep. 313.

³ Van Rensselaer v. Mould, 48 Hun, 396; 15 N. Y. State Rep. 465.

⁴ Hudson v. Houser, 123 Ind. 309.

⁵ Davis v. Sweeney (Iowa), 45 N. W. Rep. 1040.

⁶ United States v. Baxter, 46 Fed. Rep. 350.

⁷ Louisville, N. A. etc. R. Co. v. Cox, 30 Ill. App. 380.

⁸ Chamberlain v. Rogers, 79 Mich. 219.

⁹ Kelley v. Rowane, 33 Mo. App. 440.

¹⁰ Atchinson v. Rose, 43 Kan. 605; Thomas v. Coulkett, 57 Mich. 392.

¹¹ Skeels v. Starrrett, 57 Mich. 350.

¹² Sullivan v. Lear, 23 Fla. 463; 11 Am. St. Rep. 388.

¹³ Whiting v. Mississippi V. Mut. Ins. Co., 76 Wis. 592.

(7) One whose business is such that he is familiar with the market value of an article which is the common subject of sale is a competent witness to testify as to its value, although he has no personal knowledge of any particular sale.

(8) In an action for killing stock, it is competent for plaintiff to testify that the animal killed was a very fine colt, fine stock, trotting stock, and that his sire and dam were fine-blooded animals.¹ And where the action is for injury to a horse, opinion of a witness as to her speed, and her value assuming that she possessed the speed proved, is admissible.²

(9) In some states, where the amount of damages sustained is matter of opinion, and it is difficult to give the jury an adequate idea of the thing injured, the witnesses may express their opinion as to the extent of the damage.³ But it cannot be established by the statement of a witness, in a lump sum, of the amount of damages he thinks were sustained, without giving any facts or knowledge upon which his opinion is based;⁴ nor can a witness give his opinion of the value of the plaintiff's services to witness.⁵

(10) The evidence of a grocer, a hardware man, and a dry-goods dealer, as to the value of a general stock of goods, is not limited to the articles in which each usually deals.⁶

(11) A merchant in the same line of business may testify as to the value of a stock of goods as learned from casual observation;⁷ but a person is incompetent to testify to the value of jewelry, although bought by her, in the absence of proof that she is qualified to speak as an expert.⁸

(12) In an action by a land-owner to compel a company operating an elevated railroad in the street in front of his property to pay the damage done him by cutting off the easement of light, air and access connected with such property, an expert witness cannot be permitted to state what, in his

¹ East Tennessee, V. & G. R. Co. v. Watson (Ala.), 7 S. Rep. 813.

⁴ Sherman Center Town v. Leonard, 46 Kan. 354.

² Reed v. Rome, Watertown & O. R. Co., 48 Hun, 231; 16 N. Y. State Rep. 58.

⁵ Williams v. Williams, 82 Mich. 449.

³ Chicago, B. & Q. R. Co. v. Scoffer, 124 Ill. 112; Knapp & S. Co. v. Barnard, 78 Iowa, 347; Nevada & M. R. Co. v. De Lissa, 103 Mo. 125.

⁶ Carberry v. Morrell, 68 Wis. 573.
⁷ Graves v. Merchants' & B. Ins. Co. (Iowa), 49 N. W. Rep. 65.

⁸ Gregory v. Fichtner, 38 N. Y. State Rep. 192; 43 Alb. L. J. 517.

opinion, the amount of such damage is, nor what would have been the present value of the land if the road had not been built.¹ But an expert may give his opinion as to the rental value of the property with the free use of all above the surface of the street for light, air and access to and from the building.² He may also give an opinion upon the present or past value of property, based upon facts which he has observed, and on other matters which are the proper subject of expert evidence, and based upon facts known to him or proved by competent evidence, but cannot speculate upon the facts and then base a speculative opinion thereon.³

(13) The opinion of a witness who has stated the facts on which he bases it is competent on the question of value of the use of land and certain privileges for purposes for which no market value exists.⁴

(14) In actions for damages witnesses should be confined to stating facts, and should not be permitted to testify as to the amount of damages.⁵ Thus, in an action for damages for personal injuries, the plaintiff should not be allowed to state his opinion as to the amount of damages;⁶ and in an action on a fire policy, testimony of a witness as to the amount of loss and damage sustained by plaintiff by reason of the fire is incompetent as being the result of calculation upon such facts as the witness may choose to consider proper.⁷ So the opinions of witnesses as to the quantum of damage caused by the breach of an executory contract to deliver goods are inadmissible.⁸

(15) Upon the question of the value of real estate, the opin-

¹ *Suydam v. New York Elev. R. Co.*, 46 N. Y. State Rep. 360; *Sillcocks v. New York Elev. R. Co.*, id. 671; *Roberts v. New York Elev. R. Co.*, 40 id. 454; 128 N. Y. 455; 44 Alb. L. J. 454; *Gray v. Manhattan R. Co.*, 128 N. Y. 499; 40 N. Y. State Rep. 478; *Jefferson v. New York Elev. R. Co.*, 44 id. 629; 132 N. Y. 483.

² *Ottinger v. New York Elev. R. Co.*, 63 Hun, 631; 43 N. Y. State Rep. 817.

³ *Doyle v. Manhattan R. Co.*, 40 N. Y. State Rep. 474; 128 N. Y. 488.

⁴ *Gulf, C. & S. F. R. Co. v. Dunman* (Tex.), 19 S. W. Rep. 1073. But see *Pratt v. N. Y. C. & H. R. R. Co.*, 59 N. Y. State Rep. 38.

⁵ *Avery v. New York Central & Hudson River R. Co.*, 121 N. Y. 31; 30 N. Y. State Rep. 471.

⁶ *Pierce v. Lutesville*, 25 Mo. App. 317; *Smith v. Young*, 26 id. 576; *Kennedy v. Holladay*, 25 id. 503.

⁷ *Schlessinger v. Springfield F. & M. Ins. Co.*, 58 N. Y. Supr. Ct. 172; 31 N. Y. State Rep. 169.

⁸ *Young v. Cureton*, 87 Ala. 727.

ion of a witness who has seen the property and is acquainted with the value of similar land is competent evidence. It is incompetent for a witness in a proceeding for damages for property taken under the right of eminent domain to testify to the value of a part only of the property and the consequent damages sustained by that part alone.¹

(16) An opinion may be given as to the value of a building, based upon the uses to which it could be adapted.²

(17) To give an opinion as to the value of land, a witness need not have been engaged in buying and selling: it is sufficient that witness knows the property and its value;³ and a witness whose business calls his attention to sales and values in the vicinity may state his estimate of values and rentals of real estate.⁴ So practical farmers are qualified to give an opinion on the question as to what extent the rental of a farm left unfenced will be affected.⁵

(18) A practical builder may state what it was worth to build a church.⁶ Opinions of experts upon the possible and probable uses of a lot before the taking thereof for a railroad right of way are admissible as to its value.⁷

(19) In condemnation proceedings it is error to allow the question to be put and answered, "How much less was the farm worth per acre, immediately after the railroad went through, than it was before?"⁸ So, "What, in your opinion, is the depreciation in value of the property by reason of the operation of the railroad, excluding from consideration all damages sustained in common with the community at large?" The witness must state the value of the property before the road was built and its value afterwards.⁹

(20) An experienced miller may state as to the value of a lease of mill-property beyond the rent reserved.¹⁰ So a board-

¹ Schuylkill River & S. R. Co. v. Stoker, 128 Pa. St. 233.

² Kernochan v. New York Elevated R. Co., 128 N. Y. 559; 36 N. Y. State Rep. 434.

³ Chicago, P. & St. L. R. Co. v. Nix, 137 Ill. 141.

⁴ Johnston v. Manhattan R. Co., 60 Hun, 583; 38 N. Y. State Rep. 227.

⁵ Finch v. Chicago, M. & St. Paul R. Co., 46 Minn. 250.

⁶ O'Keefe v. St. Frances Church, 59 Conn. 551.

⁷ Harris v. Schuylkill River A. S. R. Co., 141 Pa. St. 242.

⁸ Chicago, K. & W. R. Co. v. Muller, 45 Kan. 85.

⁹ Gainesville, H. & W. R. Co. v. Hall, 78 Tex. 169.

¹⁰ Chamberlain v. Dunlop, 54 Hun, 639; 28 N. Y. State Rep. 375.

ing-house keeper may state as to the worth of board.¹ So one who has bought and sold furniture at second-hand sales may state as to the value of second-hand furniture.²

(21) On the question of the depreciation of a house-lot by an incumbrance limiting its use, the opinion of a witness qualified by his own knowledge to decide the question is competent.³ A farmer and logger of land may state what it will cost an acre to clear the land in question and put it in a condition for the plough.⁴

§ 6. **Offer made for property.**— While an offer made in open market, such as the produce exchange, for an article of recognized uniform character, constantly bought and sold in the market and having a place in the daily reports of prices current, is evidence of the value of such property at the time of such offer, an unaccepted offer for a piece of property not generally known in the market or to the public is not evidence of its value, because it places before the court or jury an absent person's declaration or opinion as to value, while depriving the adverse party of the benefit of cross-examination. The highest value at which an offer, standing alone, can be estimated, is that it represents the opinion of him who makes it as to the worth of the property. Such offers cannot be proven even by the party making them.⁵ There seems to be an exception to the above rule where the property has no market value.⁶ In the few cases which may be found holding the other way, the question does not seem to have received much consideration from the courts rendering the decisions, and the absence of agreement in their support renders unnecessary any special reference to them. In *Harrison v. Glover*⁷ the discussion had reference solely to the test

¹ *Hook v. Kenyon*, 55 Hun, 598; R. Co., 134 N. Y. 168; 28 N. Y. State Rep. 889.

² *Phillip v. McNab*, 30 N. Y. State Rep. 853.

³ *Foster v. Foster*, 62 N. H. 532; *Burlington & M. R. Co. v. White* (Neb.), 44 N. W. Rep. 95; *Chicago, K. & W. R. Co. v. Cosper*, 42 Kan. 561; *Pingerry v. Cherokee & D. R. Co.*, 78 Iowa, 438; *Carter v. New York El.*

⁴ *Barnum v. Bridges*, 81 Cal. 604.

⁵ *Hine v. Manhattan R. Co.*, 132 N. Y. 477; 44 N. Y. State Rep. 634; *Whitney v. Thacher*, 117 Mass. 523.

⁶ *Republican Newspaper Co. v. North W. Associated Press*, 51 Fed. Rep. 377.

⁷ 72 N. Y. 451.

which the parties had established by their contract, and was not intended to, and does not, affect the question.

§ 7. **Price paid—Sales.**—The cost of repairs of a vessel is competent evidence of the damage suffered from a collision.¹ Proof of the cost of restoring land to its former condition, and proof of diminution in the market value, are both admissible on a question of damages.² So the value of new articles of a similar kind is admissible to show the value of articles converted which were substantially new.³ So prices obtained for the goods at *bona fide* private sale are admissible on the question of value in an action against a sheriff for conversion of a stock of shop-worn goods, in connection with an offer to show that the property was sold to the best advantage, although the sales were made in a city at a distance from the place where the goods were seized, and a year afterwards, in the absence of anything to show a difference in value.⁴ Where its market value is uncertain, it is competent to show that the property had a special value for particular uses.⁵ Evidence of what a person paid for an article is competent as an element of damages, and, in the absence of other proof, sufficient to establish its value.⁶ Thus, in *Jones v. Morgan*,⁷ the plaintiff in an action for conversion testified as a witness in her own behalf to the value of certain articles of furniture. She testified that she bought them at a certain time, and paid the market price for them, and what they cost her. In that case the court said: "The defendant was to be charged with the value of the articles at the time he failed to deliver them to the plaintiff upon her demand, and their face value at that time, with interest, was the measure of plaintiff's recovery. If it was practicable to give evidence of their precise market value at that time, then such evidence should have been required. But this was second-hand furniture, having no real market value. The furniture was lost, and hence it could not be exhibited to experts for their valuation. It was incumbent upon the plaintiff to

¹ *La Champagne*, 53 Fed. Rep. 398. see *H. B. Clafin Co. v. Rodenberg*

² *Hartshorn v. Chaddock*, 135 N. Y. (Ala.), 13 S. Rep. 272.

116; 47 N. Y. State Rep. 838.

⁵ *Denver & R. G. R. Co. v. Griffeth*,

³ *Morey v. Hoyt*, 62 Conn. 542; 47 17 Colo. 598.

Alb. L. J. 310.

⁶ *Bird v. Everard*, 53 N. Y. State

⁴ *Parmenter v. Fitzpatrick*, 135 N. Rep. 210.

Y. 190; 48 N. Y. State Rep. 80. But ⁷ 90 N. Y. 4.

make the best proof she could. She therefore gave proof showing when she purchased the furniture, what it then cost her in the market, how it had been used and what its condition was, and then what the depreciation was upon furniture from the fact that it was old and had been used, and from all these facts it was for the jury to determine the value of the furniture at the time of the breach of defendant's contract." Within what range as to place and time witnesses shall be confined in their testimony to the value of personal property, when its value comes in question, must often depend upon the circumstances of the case and be in the discretion of the trial judge. When the property has a market value at the time and place, which can be proved by witnesses who can then and there speak of it, it must be proved by such witnesses. When there is no market value at the place, then its market value at some other place may be proved. If there is no market value at the time, then the market value at some other time, before or after, may be proved.¹ Prices obtained upon public sales are, for obvious reasons, considered some proof of the market value of the property sold, and are receivable as evidence upon the question of value.² The usual method, however, of proving value in legal proceedings is by the testimony of witnesses expressing their opinions under oath as to such value, based upon their knowledge of the subject-matter and familiarity with the circumstances bearing upon the question.³

§ 8. By sales or value of other property.—In Massachusetts, New Hampshire, Illinois, Iowa and Wisconsin it is held that actual sales of other similar land in the vicinity, made near the time at which the value of the land taken is to be determined, are admissible as evidence for the purpose of arriving at the amount of compensation;⁴ while in some of the other jurisdictions, notably Pennsylvania, New Jersey, Georgia and California, it is held that sales of similar property are

¹ *Roe v. Hanson*, 5 Lans. 305.

² *Campbell v. Woodworth*, 20 N. Y. 499.

³ *Clark v. Baird*, 9 N. Y. 183; 1 Greenl. Ev., § 440, n.; 1 Whart. Ev., §§ 447, 449; *Lawson's Expert Ev.*, 435; *People ex rel. Mayor, etc. v. McCarthy*, 102 N. Y. 630.

⁴ *Gardner v. Brookline*, 127 Mass.

358; *Culbertson & Blair Packing Co. v. City of Chicago*, 111 Ill. 651; *Town of Cherokee v. S., C. & I. F. Town L. & L. Co.*, 52 Iowa, 279; *Concord R. Co. v. Greely*, 23 N. H. 242; *Washburn v. Milwaukee & L. W. R. Co.*, 59 Wis. 364.

not admissible for the purpose of proving the value of property about to be taken.¹ The reasons assigned for the conclusion reached in the cases last cited are, in the main, that the test in legal proceedings is, what is the present market value of the property which is the subject of controversy. It may be shown by the testimony of competent witnesses, and on cross-examination, for the purpose of testing their knowledge respecting the market value of land in that vicinity, they may be asked to name such sales of property, and the prices paid therefor, as have come to their attention. But a party may not establish the value of his land by showing what was paid for another parcel similarly situated, because it operates to give the agreement of the parties the effect of evidence by them that the consideration for the conveyance was the market value, without giving to the opposite party the benefit of cross-examination to show that one or both were mistaken. If some evidence of value, then *prima facie* a case may be made out, so far as the question of damages is concerned, by proof of a single sale, and thus the agreement of the parties, which may have been the result of necessity or caprice, would be evidence of the market value of land similarly situated, and become a standard by which to measure the value of land in controversy. This would lead to an attempt by the opposing party to show, first, the dissimilarity of the two parcels of land, and second, the circumstances surrounding the parties which induced the conveyance; such as a sale by one in danger of insolvency, in order to realize money to support his business, or a sale in any other emergency which forbids a grantor to wait a reasonable time for the public to be informed of the fact that his property is on the market; or, on the other hand, that the price paid was excessive and occasioned by the fact that the grantee was not a resident of the locality nor acquainted with real values, and was thus readily induced to pay a sum far exceeding the market value. Thus each transaction in real estate claimed to be similarly situated might present two side issues, which could be made the sub-

¹ East Pa. R. Co. v. Hiester, 40 Pa. St. 53; Pennsylvania R. R. Co. v. Bonnell, 81 id. 414; Pennsylvania S. R. Co. v. Zeiner, 124 id. 560; Montclair R. Co. v. Benson, 36 N. J. L. 557; Selma, etc. R. Co. v. Keith, 53 Ga. 173.

ject of a vigorous contention as to the main issue, and, if the transactions were numerous, it would result in unduly prolonging the trial and unnecessarily confusing the issues, with the added disadvantage of rendering preparation for trial difficult. Thus, in *Huntington v. Attrill*¹ the defendants attempted to prove the value of certain seaside property by showing the value of other property of the same general character situated near the property in dispute, and the court said: "It may be that such evidence would have furnished some guide for an estimate of the value of the property, but might not. Such evidence would present collateral issues which might, and very likely would, involve a variety of considerations having relation to similarity or difference, and to advantages and disadvantages of the different properties in numerous respects as compared with that in question. It is quite well settled that evidence of that character is not admissible upon the question of the value of property in controversy."

The question was not necessarily before the court in *People ex rel. Mayer v. McCarthy*,² but Ruger, C. J., referring to the question whether the price paid on sales of real property between individuals is admissible as evidence of value, said: "We think it quite clear, however, that such price is not in any view competent evidence of value." In *Blanchard v. N. J. Steamboat Co.*³ the defendant attempted to show the value of a sunken steamboat by proving the value of other steamboats with which she could be compared, and it was held that the evidence was not competent. It seems that the value of property which depends upon the presence or absence of inherent qualities not necessarily present or absent in other and similar property cannot be proved by showing the price paid for such other and similar property. The value of property having a recognized market value, such as No. 1 wheat and corn, may of course be proven by showing the market prices; but the value of property which is dependent upon locality, adaptability for a particular use, as well as the use of property immediately adjoining, may not be shown by evi-

¹ 118 N. Y. 365; 29 N. Y. State Rep. 5.

² 102 N. Y. 630; 2 N. Y. State Rep. 566.

³ 59 N. Y. 292.

dence of the price paid for similar property. Even under the Massachusetts rule, a reversal would not be justified because of the extent of the discretion vested in the judge or officer presiding at the trial to determine whether such evidence is admissible, depending, of course, on various elements, such as the nearness or remoteness of the time of sale; whether the premises are far separated; the condition of the property about the parcel sold, and the use made of it, which may have operated to enhance or diminish its selling value; the similarity of the property, not only as to description, but as to its availability for use.¹ In *Matter of Thompson*² it was held that the value of property, such as a water-power, which is dependent upon locality, adaptability for a particular use, as well as the use of property immediately adjoining, may not be shown by evidence of the price paid for similar property. In New Jersey it is held that evidence of the sales of other land in the neighborhood is competent on an inquiry as to the value of land, only when there is substantial similarity between the properties.³ The same rule prevails in Washington.⁴

§ 9. Sum inserted in deed no evidence of value of land.—The sum inserted in a deed, when not authenticated in such a manner as to make it evidence of the actual consideration, is not evidence of the value of the property, even if the price paid on sales of real estate between individuals should be deemed admissible at all as evidence of value. Such sum is not in any view competent evidence of value.⁵ No rule of law requires the true consideration paid upon a transfer of land to be inserted in conveyances of real estate, and it is within the common knowledge of all conveyancers that the amount stated therein is often determined by fanciful, capricious and arbitrary considerations, which render it utterly unreliable as evidence of value. It is frequently depressed by forced and unnatural sales, and as often enhanced by fictitious values placed upon property transferred in exchange, or deeded in settlement of disputed claims, or given from consideration of affec-

¹ *Chandler v. Jamaica Pond Aqueduct Corp.*, 122 Mass. 305; *Gardner v. Brookline*, 127 id. 358-363.

² 127 N. Y. 463; 40 N. Y. State Rep.

200.

³ *Laing v. United N. Y. R. & C. Co.*, 54 N. J. L. 576.

⁴ *Seattle & M. R. Co. v. Gilchrist*, 4 Wash. 509.

⁵ *Bouvier's Inst.* 1224.

tion, liberality and duty, and is at the best but the opinions of the grantors and grantees of its value, or a declaration of the value placed by them upon the property. Such prices have usually been held inadmissible as evidence of value in actions relating to property, for the reason that they are liable to be influenced by too many causes, aside from the actual value, to be regarded as competent evidence of that fact.

§ 10. **Where there is no market value.**— If the property is of such a character as to have no market value, then other proof tending to show the value at the proper time and place must of necessity be resorted to. Nothing in conflict with these views appears to have been decided in *Beach v. Raritan & D. B. R. Co.*¹ In that case the action was to recover the value of a barge, and it was said to be erroneous to allow proof of the price paid for the barge six years before the time at which her value was to be estimated for the purpose of the trial. There does not appear to have been any difficulty to prove the market value of the barge at the time she was converted by the defendant, and it does not appear that there was any necessity to resort to the price paid.

§ 11. **Work, service, damages.**— The price agreed upon for work and labor done under a contract is admissible as evidence of the value of the services rendered in an action therefor brought after the contract is abandoned.² So evidence of the value of the service is admissible where the evidence is conflicting as to whether the minds of the parties ever met upon the amount of compensation.³ Evidence of the value of the services of one for whose wrongful death suit is brought, in the various occupations in which he has been engaged, is competent and relevant in estimating the value of his life.⁴ In an action for personal injuries, evidence of the reasonable price of the services of a nurse is admissible, where plaintiff has been so disabled that he is unable to care for himself.⁵

¹ 37 N. Y. 457.

⁴ *Christian v. Columbus & P. R. Co.*, 90 Ga. 124.

² *Roberts v. Demens Wood Work-*
ing Co., 111 N. C. 432.

⁵ *Turner v. Boston & M. R. Co.*, 158

³ *Constable v. Lefever*, 66 Hun, 628; *Mass.* 261.

49 N. Y. State Rep. 294; *Saunders v. Gallagher* (Minn.), 55 N. W. Rep. 600.

§ 12. Proof of value in action on special contract.—

Where one party to an action to recover the value of services or of property sets up a special agreement as to the price or value, which is controverted by the other party, who also alleges a special agreement, it is proper for either party to prove the value of the services or of the property, as bearing upon the issue between them, and the probability that the one or the other agreement was made.¹ Thus, where a plaintiff in an action to recover for services rendered claims that the defendant made a special agreement to pay him a certain amount for such services, the defendant denying such agreement not only has the right to give evidence directly disproving it and contradicting the plaintiff's evidence in reference thereto, but he has the right also to give evidence showing that it is extremely improbable that such a contract was made; and if he can show that the price claimed by the plaintiff is vastly disproportionate to the value of the services, it has a tendency to impair the force of the plaintiff's evidence and the weight which it would otherwise receive.²

§ 13. Benefits to premises.— In an action to restrain the operation of an elevated road in a highway in front of abutting premises and for part damages, evidence of benefits to the premises from the presence of such road is material and admissible.³

II. PECUNIARY CONDITION, ETC.

§ 14. In general.— The wealth of a defendant in an action for slander by imputing unchastity to a female has no relation to the injury suffered by the plaintiff, and cannot be shown in aggravation of damages in the courts of New York.⁴ But evidence that the plaintiff had a family of young children is

¹ *Cornell v. Markham*, 19 Hun, 275; *Cornish v. Graff*, 36 id. 160; *Knallan v. Beck*, 47 id. 117; 13 N. Y. State Rep. 235; *Sturgis v. Hendricks*, 51 N. Y. 635; *Kavanaugh v. Wilson*, 70 id. 177.

² *Barney v. Fuller et al.*, 133 N. Y. 605; 44 N. Y. State Rep. 902.

³ *O'Dell v. Metropolitan El. R. Co.*, 52 N. Y. State Rep. 7. But see *Lazerous v. Metropolitan El. R. Co.*, 53 id. 31; 69 Hun, 190.

⁴ *Enos v. Enos*, 135 N. Y. 609; 48 N. Y. State Rep. 392; *Roach v. Caldwell*, 64 Vt. 593.

admissible on the question of damages; and evidence of the pecuniary condition of the plaintiff in an action for a personal tort is admissible when there is oppression or malice justifying exemplary or punitive damages;¹ and for like reasons the number and *status* of the plaintiff's family may be shown.² So in an action for slander, evidence of defendant's business standing and position is admissible on the question of the weight of the charge coming from him.³

§ 15. **Breach of promise of marriage — Reputation of defendant's wealth.**—Evidence of defendant's general reputation as to wealth at the time of an alleged agreement of marriage is admissible upon the trial of an action for breach of promise to marry. Such evidence, on first consideration, seems to conflict with the general rule that in actions for a breach of contract evidence as to defendant's wealth is inadmissible. And this rule of exclusion as to such evidence has been also applied to cases where damages are sought to be recovered for seduction, or for criminal conversation. Thus, in *Dean v. Wycoff*,⁴ the court say: "The jury should not be allowed to go beyond the issue between the parties litigating, and, after indemnifying the plaintiff for the injury sustained by him, proceed, as conservators of the public morals, to punish the defendant in a private action for an offense against society. The principle underlying the exclusion of this kind of evidence in the latter class of cases is that vindictive or punitive damages would be improper, as the recovery in them should be confined to what the jury deem to be a sufficient compensation for the injury sustained by the plaintiff. But an action for breach of promise of marriage constitutes an exception to that general rule upon the subject of damages for violation of contract obligations which has been assented to by the judges of the courts of this country and England. It is apparent that in such an action there can be no hard-and-fast rule of damages, and that they must be left to the discretion of the jury. Of course, that discretion is not so absolute as to be

¹ *Beck v. Douell*, 111 Mo. 506.

³ *Ellis v. Whitehead*, 95 Mich. 105.

² *Kellebrew v. Carlisle* (Ala.), 12

⁴ 3 Seld. 191.

S. Rep. 167; *Christian v. Columbus & R. R. Co.*, 90 Ga. 124.

independent of a consideration of the evidence. That the amount of the suitor's pecuniary means is a factor of some importance in the case of a demand of marriage cannot fairly be denied. The jury should be made aware of all the circumstances which he supposed to have presented themselves to the mind of the plaintiff when asked to change her position by a marriage. The wealth and the reputation for wealth of a man are matters which, as this world is constituted, often aid in determining his social position.¹

III. LIBEL — REPETITION.

§ 16. **In general.**—A plaintiff in an action for libel or slander may prove a repetition by the defendant, before the commencement of the action, of the slander charged in the complaint, as bearing upon the degree of malice which actuated him in speaking the words laid. It is not necessary that the words are the same, nor substantially the same, as those laid in the complaint, if they are of the same import. The words laid in the complaint must be proved in substance, and different words, although imputing the same charge, but in entirely different language, will not support the complaint. But where the object of proving other words is to show the malicious intent of the defendant in speaking the words laid, then, provided they impute the same and not a different charge, or a charge of a different nature, they are competent. If the words are a repetition of the same calumny, the particular form of words in which the repetition is clothed is immaterial. The proof of such words would bar another action by the plaintiff founded thereon, to the same extent as if the words were identical.² Words proved as repetitions of the slander charged are not independent ground of action in the case and no recovery can be had for uttering them.³ In an action for slander in imputing unchastity to a female, a repetition of the imputation in other words than those laid in the complaint

¹ Mayne on Damages (Wood's ed.),
§ 677; Kniffen v. McConnell, 30 N.
Y. 289; Chellis v. Cleafman, 125 N.
Y. 214; 35 N. Y. State Rep. 20.

² Root v. Lowndes, 6 Hill, 518.

³ Enos v. Enos, 135 N. Y. 609; 48
N. Y. State Rep. 392.

may be proved as bearing upon the defendant's malice, but not to sustain the action.¹ So in an action for libel, by imputing unchastity to a woman, testimony of insulting letters and untimely calls from men received by the plaintiff is competent as showing how the publication was understood.

§ 17. **Repetition of libel after action commenced.**— In an action for libel, evidence of the repetition of the libel, or publication of other libelous matter after the commencement of the action, is inadmissible for any purpose.²

¹ *Enos v. Enos*, 135 N. Y. 609; 48 N. Y. State Rep. 392.

² *Eccles v. Rodam*, 57 N. Y. State Rep. 657.

CHAPTER XX.

PRACTICE IN ADMISSION AND REJECTION OF EVIDENCE.

I. EXAMINATION IN CHIEF.

- § 1. Leading questions not allowed when.
- 2. Cross-examination.
- 3. Examination as to previous statements in writing.
- 4. Re-examination.
- 5. Limit of extent of whole conversation.
- 6. Whole writing — Limit of rule as to.
- 7. Papers made at different times.

II. OBJECTION TO EVIDENCE.

- 8. In general.
- 9. When general objection sufficient.
- 10. When objection must assign the particular ground.
- 11. One objection to same class of evidence sufficient.
- 12. Answer irresponsive in part — Remedy of opposite party.
- 13. Questions by co-defendant.
- 14. Direction to disregard evidence.
- 15. When motion to strike out comes too late.
- 16. Objection — When to be made.

III. EXCEPTIONS.

IV. CRIMINAL EVIDENCE.

- § 17. In general.
- 18. Motive — Other crimes.
- 19. Insanity.
- 20. Communications to defendant.
- 21. Threats by deceased.
- 22. Threats by defendant.
- 23. Malice.
- 24. Accomplice — Corroboration, when necessary.
- 25. Who are not accomplices.

V. FALSE IMPRISONMENT — MALICE.

VI. JUDGMENTS.

VII. RES ADJUDICATA.

- 26. In general.
- 27. Not pleaded.
- 28. Between strangers.
- 29. Adjudication.
- 30. Parol evidence to show.
- 31. Defenses.
- 32. Surrogate's court.
- 33. Judgment in criminal case not evidence in civil case.

VIII. ESTOPPEL.

- 34. In general.
- 35. Insurance — Preliminary proof not conclusive.
- 36. In relation to *bona fide* purchasers of commercial paper.

I. EXAMINATION IN CHIEF.

§ 1. **Leading questions not allowed when.** — It being supposed that a witness called by a party is interested in favor of the party, it is a rule that upon his examination in chief leading questions shall not be put to him. It is necessary to a certain extent to lead the mind of the witness to the subject

of the inquiry,¹ as where there is difficulty or impossibility of obtaining the object for which the witness is called, and where a witness, examined in chief, by his conduct in the box shows himself decidedly adverse to the party calling him, it is in the discretion of the judge to allow him to be examined as if he were on cross-examination;² and where he stands in a situation which, of necessity, makes him adverse to the party calling, the party may as a matter of right cross-examine him. Somewhat similar to this is the question whether, where a witness called for one party is afterwards called by the other, the latter party may give his examination the form of a cross-examination. It has been held that where a witness has been originally examined as the witness of one party, the privilege of the other to cross-examine remains through every stage of the case.³

§ 2. Cross-examination.— Upon cross-examination the witness cannot be asked leading questions in respect to new matter;⁴ and here I take occasion in broad terms to dissent from the doctrine broached in Phillips' Law of Evidence, that a witness actually sworn, though not examined by the party who called him, is subject to cross-examination by the adverse party, and that the right to cross-examine is continued through all the subsequent stages of the cause, so that the adverse party may call the same witness to prove his case and for that purpose ask him leading questions. The defendant cannot cross-examine the plaintiff's witness to matters entirely new in order to introduce his defense untrammelled by the rules of direct examination.⁵ And when a witness is called to state a particular fact, it is improper to lead him to a full statement of the defendant's case, which is not yet open to the court and jury; for the party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him on other matters, he must do so by making the witness his own, and calling him as such in the subsequent

¹ *Nicholl v. Douding*, 1 Stark. 81;
Accerro v. Petroni, id. 100.

² *Murfey's Case*, A. C. & P. 297.

³ *Dickerson v. Shee*, 4 Esp. 67; 1
Stark. Ev. 162.

⁴ *Harrison v. Rowan*, 3 Wash. C. C.
580.

⁵ *Coster v. Babington*, 2 Watts &
Serg. 505; *Outmaker v. Buckley*, 16
Serg. & Rawle, 77.

progress of the cause.¹ But the interest which a witness has in the subject of the controversy is a material inquiry, as it bears upon the question of credibility; and the fact may be shown upon cross-examination, and, if denied, admissions or declarations out of court showing interest may be proved. The relations which the witness bears to the case are so far relevant to the issue as to admit proof of contradictory statements by way of impeachment when the proper foundation is laid.²

§ 3. **As to previous statements in writing.**—It was settled in the Queen's Case³ that when, upon cross-examination, a witness is asked whether or not he has made any previous statements, the opposing party may interfere and ask whether the representation referred to was in writing or verbal. If it appear to be in writing, then the writing itself must, if possible, be produced in order to show its contents, and they cannot be got from the witness under cross-examination. But if for any valid reason the writing cannot be produced, then the usual principles on which secondary evidence is admissible will apply, and the contents of the document may be proved by the admission of the witness. And a witness under cross-examination may not be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him, or its non-production satisfactorily accounted for, and notice being given him of its contents.⁴

§ 4. **Re-examination.**—A re-examination, which is allowed only for the purpose of explaining facts which may come out on cross-examination, must of course be confined to the subject-matter of the cross-examination.⁵ The re-examination of a witness is not to extend to any new matter unconnected with the cross-examination, and which might have been inquired into on the examination in chief. If new matter is wanted, the usual course is to ask the judge to make the in-

¹ Philadelphia & T. R. Co. v. Stimpson, 14 Pet. 448; Farmers' Bank v. Strohecker, 9 Watts, 183.

² Matter of Snelling, 49 N. Y. State Rep. 695.

³ 2 B. & B. 292 (6 E. C. L.).

⁴ Callahan v. Shaw, 24 Iowa, 441; Cafney v. People, 50 N. Y. 416; Newcomb v. Griswold, 24 N. Y. State Rep. 298.

⁵ 1 Stark. Ev. 179.

quiry. In such cases he will exercise his discretion and determine how the inquiry, if necessary, may be most conveniently made, whether by himself or by the counsel.¹ I think the counsel has a right on re-examination to ask all questions which may be proper to draw out an explanation of the sense and meaning of the expressions used by the witness on cross-examination if they be themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but he has no right to go farther and introduce matter new in itself and not suited to the purpose of explaining either the expressions or motives of the witness. I distinguish between a conversation which a witness may have had with a party to a suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to a suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit; and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court all that was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit.

§ 5. Limit of extent as to whole conversation.—There is a limit to the extent to which a party may go in calling out what was said by and to him in a conversation, parts of which the other party has proven.² In the case last cited the rule for that limit is adopted and followed which is laid down in *Prince v. Samo*.³ The rule is this: that when part of a conversation has been given in evidence, any other or further part of that conversation may be given in evidence in reply which would in any way qualify or explain the part first given. In the case last cited the rule is applied only to the declarations of a party to the action; and so far it is approved in *Garey v. Nicholson*.⁴ But the rule extends to the conversation of other parties.⁵

¹ 1 Phil. Ev. 840.

² *Rouse v. Whited*, 25 N. Y. 170.

³ 7 Ad. & Ell. 627.

⁴ 24 Wend. 350.

⁵ *Platner v. Platner*, 78 N. Y. 90.

§ 6. **Whole writing—Limit of rule as to.**—The rule is that a party in whose behalf portions of a writing or the record of legal proceedings are admissible need not introduce the whole record. It is for the other party to introduce such other parts as relate to the same subject;¹ and a portion of a letter between parties, though not relating to the same subject as the portion introduced by the adverse party, may be introduced by the writer when of a nature to elicit a reply, and none was made.² So the introduction in evidence by one party of the findings in another suit between them renders admissible the other findings in such suit in behalf of the other party.³

§ 7. **Papers made at different times.**—An instrument offered to establish a defeasance entered into subsequently to a deed, and not in pursuance of the original agreement made at or before its execution and delivery, cannot be read with the deed. But it is not essential that they should have been reduced to writing at the same time, or bear the same date.⁴ It is sufficient if they constitute part of the same transaction. While the recording of a deed raises the presumption that it had been delivered at or before the time that it was put on record, it is not conclusive, and may be overborne by evidence that it had not been delivered, and was not until a later period.⁵

II. OBJECTIONS TO EVIDENCE.

§ 8. **In general.**—Mr. Austin Abbott says that “The experience of the bar shows that in judicial investigation it is just as important to have the right kind of light, and from the right quarter, and to exclude all others, as in microscopic investigations. The best light from the best quarter is the condition for securing both truth and clearness of truth; hence a considerable part of the rules of evidence consists of discriminating against kinds of evidence unfit to be laid before

¹ King v. State, 91 Tenn. 617; Priest v. Glenn, 51 Fed. Rep. 400.

² Fleischmann v. Toplits, 134 N. Y. 349; 47 N. Y. State Rep. 892; 46 Alb. L. J. 470.

³ Sheahan v. National Steamship Co., 66 Hun, 48; 49 N. Y. State Rep.

484; Medlin v. Wilkins, 1 Tex. Cr. App. 465.

⁴ Harrison v. Trustees, etc., 12 Mass. 456; Lund v. Lund, 1 N. H. 39; 2 Wash. R. P. (5th ed.) 56.

⁵ Kraemer v. Adelsberger et al., 122 N. Y. 467; 34 N. Y. State Rep. 24.

a jury, who are sworn to decide according to the evidence laid before them. Another part of the rules of evidence consists of exceptions to those exclusory rules which experience has found may safely be allowed." Judges sitting at trial court with a jury are not allowed to become enlisted in calling out evidence on either side; but, with the slight exception of calling out explanations, they are confined to listening to the controversy as presented by the parties on each side. If the judge assumes to determine a question of credibility or weight he usurps the function of the jury, and the verdict will not stand. If the judge leaves it to the jury to determine a question of competency, he is abdicating his power, and the verdict will not stand. To state the distinction more closely, the judge decides all questions of law, except libel or no libel in a criminal prosecution. He also decides all questions of competency and regularity in the reception of evidence, and all questions of fact incidental thereto, and finally he decides whether the evidence is such as to make a question of fact suitable for the jury. During the reception of evidence at a trial the function of the judge in respect to the evidence is simply to decide this question, viz.: Is this evidence now offered fit to be laid before the jury? This question, whether offered evidence should be received, has two aspects, viz.: Do the pleadings lay a foundation for it; that is to say, is the fact which it is proposed to prove relevant to the controversy the court is to try, or is the mode in which it is proposed to prove the fact a legal mode. Neither of these words, "admissible," "relevant," or "competent," is usually sufficient in stating an objection to evidence; but the objection must usually be so expressed as to indicate the particular ground on which the objector deems that the evidence offered is inadmissible, irrelevant or incompetent. Where a preliminary question — as where alleged partners are sued and the partnership is denied, and it is proposed to give in evidence against both a declaration or admission made by one of the alleged firm — is identical with one of the questions at issue which the jury will have to decide in reaching a verdict, the proper practice is for the judge to take the evidence and submit it to the jury with proper instructions. He only decides whether evidence enough to justify the jury in deciding whether a part-

nership exists has been given, and if so he receives the evidence provisionally, to be acted upon or not by the jury, according to their decision of the question on which its competency depends.

§ 9. **When general objection sufficient.**—A general objection to the admissibility of a fact in evidence is sufficient in case the fact offered is wholly incompetent and its incompetency cannot be obviated by other evidence. When the mode by which the fact is offered to be established is *prima facie* incompetent under the general rules of evidence, and attention is called by an objection to the reason why the mode is illegal, it is sufficient.¹ When expert evidence is offered where expert evidence is not competent, the objection should be made that the question is “not within the competency of the witness and is not within the competency of any witness,” or that “the question is not within the competency of this expert or any expert,” or that it is hypothetical, speculative and incompetent.² While it seems that a witness is incompetent to testify as to what would be the value of property if certain things did not exist, in order to make such witness incompetent to so testify it must be specifically objected that the opinion of the witness is inadmissible on the subject. Such evidence should not be excluded on the ground that it is immaterial or incompetent, or that the question is hypothetical. But in such case an objection that it is speculative and not the proper method of proving damages is sufficient.³ The proper objection would be that the question calls for what the judge is to determine on the other testimony.⁴

§ 10. **When the objection must assign the particular ground.**—An objection to a question which fails to assign any ground for the exclusion of the testimony called for is not good, unless the question is wholly improper or the testimony it calls for wholly inadmissible. The reason for the

¹ *Lahey v. Oltman & Co.*, 73 Hun, 61; 56 N. Y. State Rep. 108.

² *Jefferson v. New York El. R. Co.*, 132 N. Y. 483; 44 N. Y. State Rep. 629.

³ *Pratt v. N. Y. C. & H. R. R. Co.*,

59 N. Y. State Rep. 38; *Hunter v. Manhattan R. R. Co.*, 141 N. Y. 281.

⁴ *Roosevelt v. New York El. R. Co.*, 57 N. Y. Super. Ct. 438; 29 N. Y. State Rep. 266; *McGean v. Manhattan R. Co.*, 117 N. Y. 219; 27 N. Y. State Rep. 338

rule is that, if the ground had been stated, the form of the question might have been changed, or the counsel might have conceded the incompetency of the evidence and have withdrawn the question.¹ The office of an objection is to stop an answer, but the remedy, if an improper answer is given, is by a motion to strike out, or by a request for instructions to the jury that they disregard it.

§ 11. One objection to same class of evidence sufficient.--

When upon a trial an objection has once been distinctly made and overruled, it need not be repeated to the same class of evidence. The rule in such cases has been laid down and should be observed in the further progress of the trial, without further vexing the court with useless objections and exceptions. Nothing is waived by conforming to the rule laid down in *Dilleber v. Home Life Ins. Co.*² Where a general objection to proof offered is sustained, error will not lie if any true ground of objection exists. But if the proof is objectionable simply upon a ground which might be obviated, if specified, and such objection is not made, while others not tenable are stated, the former will be deemed to have been waived.³

§ 12. Answer irresponsive in part—Remedy of opposite party.—When the question put to a witness in itself calls for nothing but testimony which is proper, but in the course of the answer improper matter is added or intermingled with it, the remedy of the opposite party is by motion to strike out whatever appears to be improper or irresponsive to the inquiry.⁴ When in such a case the party against whom the testimony was given omits at the trial to insist upon his right to have what is incompetent separated from what is competent and the former excluded, he cannot, upon appeal, select such parts of the testimony as may appear to be improper, but were not necessarily called for by the question, and ask the court to reverse on such grounds.⁵

§ 13. Questions by co-defendant.—Though improper evidence is offered generally in the case by a co-defendant and

¹ *Turner v. City of Newburgh*, 109 N. Y. 301; 15 N. Y. State Rep. 93. Rep. 873; 110 N. Y. 562; *Bronner v. Frauenthal*, 37 id. 166; *Bardin v. Stevenson*, 75 id. 164.

² 69 N. Y. 256.

³ *Height v. People*, 50 N. Y. 392.

⁵ *Holmes v. Roper et al.*, 56 N. Y.

⁴ *Denise v. Denise*, 18 N. Y. State Rep. 596.

not by the plaintiff, the appellant's objection to its introduction is available against the plaintiff. The plaintiff's position is like that of a party when a trial judge asks of a witness an improper question which is objected to, and the objection is overruled and an exception taken.¹

§ 14. **Direction to disregard evidence.**—Where the court instructs the jury to disregard testimony, and there is other evidence to support the verdict, it will be presumed that the instructions were obeyed and the error in its omission cured.² In *Holmes v. Moffat*³ the testimony of witnesses, including irrelevant statements, was read upon the trial before the objection was made. Counsel promptly moved to strike it out and the motion was denied. On subsequent reflection the court directed the jury to disregard the matter specified, and that said matter was not before them at all. In that case it was held that such instruction cured any error in refusing to strike out.

§ 15. **When motion to strike out comes too late.**—Evidence admitted either without objection, or properly on an objection, which for any reason should not be considered by the jury or affect the result, is not necessarily to be stricken out, but may be retained in the discretion of the court; the remedy of the party being to ask for instructions to the jury to disregard it. The office of an objection is to stop an answer. When the question is improper and has been put, and the witness answers that with proper and responsive matter, and of his own motion adds something else irrelevant, an objection does not check it. The improper part of the answer is to be met and its effect taken away by motion to strike out, or request for instruction to the jury that they disregard it. Though the court sustain the objection, the improper evidence is on the record. A motion made to strike out and granted removes it therefrom.

§ 16. **Objections — When to be made.**—A party who sits by during the reception of incompetent evidence without properly objecting thereto, and thus takes his chance of ad-

¹ *Palmer v. Transportation Co.*, 57 N. Y. State Rep. 307. But see *Schneider v. Second Ave. R. Co.*, 133 N. Y. 583.

² *Pennsylvania Co. v. Roy*, 102 U. S. 459.

³ 120 N. Y. 159; 30 N. Y. State Rep. 779.

vantage to be derived by him therefrom, has not, when he finds such evidence prejudicial, a legal right to require the same to be stricken out. An objection can have no force so far as the testimony which preceded it is concerned.¹

III. EXCEPTION.

An exception taken during the progress of a trial is a protest against the ruling of the court upon a question of law.² It is designed as a warning for the protection of the opposing counsel so that he may consent to a reversal of the ruling. Unless the question of law upon which a ruling is sought is so stated that it is or should be understood, an exception is of no avail, because the exception is to the ruling as made, and the ruling is upon the question as stated.

IV. CRIMINAL EVIDENCE.

§ 17. **In general.**—The fact that a particular piece of evidence is not conclusive of guilt does not render it inadmissible. Any fact or circumstance which, with other facts offered in evidence, bears upon the charge in a criminal case, is competent, although its tendency to prove guilt is slight when taken alone.³ The fact of finding liquor in a stable used by defendant in common with others, and his conduct in regard to it, is competent in a prosecution for illegally keeping intoxicating liquor.⁴

§ 18. **Motive — Other crimes.**—While evidence merely to show previous bad and vicious character is inadmissible against one on trial for the commission of a criminal offense, if the depraved acts offered to be shown evidence or throw light upon motive, they become admissible. The rule that evidence in criminal cases should be confined strictly to the question in issue is not infringed upon because the evidence offered, while tending to show some essential fact in the guilt of the ac-

¹ De Caumont v. Morgan, 5 N. Y. Rep. 275; Richards v. State, 36 Neb. State Rep. 541. 182; State v. Best, 111 N. C. 638;

² Anderson's Law Dict. 426.

Hodge v. State (Ala.), 12 S. Rep. 164.

³ State v. Rhodes, 111 N. C. 647; ⁴ Com. v. Moore, 157 Mass. 324; Com. v. Brothers, 158 Mass. 200; Com. v. Hurley, 158 id. 159. United States v. Newton, 52 Fed.

cused, may also prove the commission of another offense. Such evidence is relevant and admissible whenever its presence goes to sustain the charge by showing *scienter* or motive, for those facts are essential elements of a crime.¹ Thus, on a trial for killing an officer while he was attempting to arrest defendant without a warrant, evidence that defendant was guilty of a burglary on the night before the homicide is competent to show the right of the deceased to make the arrest, and that defendant knew why the arrest was made.² Crime is never committed without a motive; and hence, on the trial of a person charged with crime, it is always competent to give evidence showing the motive which induced the criminal act. When the crime is clearly proved and the criminal positively identified, it is not important to prove motive. But where the case depends upon circumstantial evidence, and the circumstances point to any particular person as the criminal, the case is much fortified by proof that he had a motive to commit the crime. When the motive appears, the probabilities created by the other evidence are much strengthened.³ Thus, in order to show motive, it may be shown that the party had committed another crime.⁴ So when it is proved that the defendant has committed some act, and the motive with which it is done is material, he may testify in regard to his motive and may prove facts by others tending to show his intent.⁵

§ 19. *Insanity*.—The defendant in a criminal action has the right to submit material evidence in his behalf to the jury in order that it may pass upon its weight and credibility, and if he is deprived of that right it is a substantial one which, when properly presented to the court by an exception, will require a reversal of his conviction. This does not in the least affect the existence and force of the other and well-known rule that a new trial will not be granted for an erroneous ruling of the court upon some legal proposition where the ap-

¹ *People v. Stout*, 4 Park. Cr. Rep. 71; *People v. Harris*, 136 N. Y. 423; 49 N. Y. State Rep. 751.

² *White v. State*, 70 Miss. 253.

³ *People v. Dailey*, 73 Hun, 16; 57 N. Y. State Rep. 10.

⁴ *Pontius v. People*, 82 N. Y. 339; *Pierson v. People*, 79 id. 424.

⁵ *People v. Gardiner*, 73 Hun, 66; 57 N. Y. State Rep. 18.

pellate tribunal can see that by no possibility could the error have worked any harm to defendant. In the case of the rejection of important, material and competent evidence for the defendant, the court cannot say, unless in a most extraordinary case, that by no possibility could the error harm the defendant, or that such error was only technical and no substantial right of the defendant was affected. A substantial right of defendant in such case is affected, even though the appellate court would, with the evidence before it, still come to the same conclusion as the jury did without it.

§ 20. **Communications to defendant.**— Where the defense is insanity, and when evidence has been given tending somewhat toward proof of a diseased condition of the brain of defendant before certain communications were made to him, any communications made to him after the time when such alleged diseased condition of mind appeared may be proved for the purpose of showing the effect it had upon defendant's mind, and to show a reason for an alleged change in the appearance and conduct of the accused, and to prove that in truth such a communication, acting upon a diseased and weakened brain, produced insanity at the time of the commission of the crime. It is competent for the reason that all the facts are material for the purpose of enabling the jury to say what was the condition of the mind of defendant when the deed was perpetrated. The defense is entitled to prove more than the fact that, after a certain time when something was told defendant, he exhibited certain changes of deportment or appearance. He is entitled to have the jury see that there was a cause sufficient to account for and to create such alteration in conduct and appearance. It is admissible for the same reason that evidence is competent to show that a party had a fall on his head, or had been a sufferer for years from some kind of physical ailment which had naturally a depressing influence on his mind. In fine, the evidence is admitted on the ground that it is corroborative, more or less strongly, of the mental condition which the other and separate evidence in the case tends to prove. In *People v. Wood*¹ there had been a large amount of evidence already given to show, prior to

¹126 N. Y. 249; 36 N. Y. State Rep. 952.

the communication, a diseased and depressed mental condition of the defendant; and the communication made to him by his wife was offered for the purpose of showing its effect upon his mind, and as furnishing an adequate cause, under all the circumstances, for the alleged fact that he was insane when the act was done. In that case the courts say: "It is not admissible for the purpose of showing sudden passion, because it is not limited to any particular time. It is not necessary that the evidence should already show that the defendant was actually insane. Whether it is necessary, in all cases where the defense of insanity is interposed, to show the existence of a prior morbid and diseased condition of the mind before evidence of certain communications to him should be admitted, is not fully settled. Deliberation is not the least inconsistent with the legal insanity of the person deliberating, and hence the fact of deliberation offers no obstacle to the reception of the evidence. An insane man frequently deliberates, and after the most mature deliberation commits acts which but for his insanity would be crimes. The question always is, not did the party deliberate, but was he at the time insane within the legal definition of that term?"

§ 21. **Threats by deceased.**— While threats of a person killed, forming no part of the *res gestæ*, and not communicated to the accused, are in general inadmissible,¹ uncommunicated threats by the deceased to kill one who afterwards, on the same day, kills him in a rencounter begun by the former, are admissible in evidence on the trial of the latter,² or where there is an uncertainty as to who began the encounter.³ But, as a general rule, an overt act or hostile demonstration by the deceased against the accused must be proved before the introduction in evidence of threats on his part communicated to the accused is admissible.⁴

§ 22. **By defendant.**— Evidence of threats and acts of violence on the part of the defendant against one whom he is charged with having murdered, or assaulted with intent to

¹ Seibert v. People, 143 Ill. 571;
State v. Walsh, 44 La. Ann. 1122.

² Pittman v. State (Ga.), 17 S. E.
Rep. 856.

³ May v. State, 17 S. E. Rep. 108;
Wilson v. State, 30 Fla. 234.

⁴ State v. Harris, 45 La. Ann. 42;
Mealer v. State (Tex.), 22 S. W. Rep.
142

murder, is admissible as tending to show malice and consequent motive for the crime;¹ but evidence that a person was a man of quarrelsome nature and feared in the neighborhood as a person of dangerous character, and had on previous occasions threatened to kill others, is inadmissible when not coupled with an offer to show knowledge by the other party of the facts sought to be proved.²

§ 23. **Malice.**—The law presumes malice from a killing with a deadly weapon; and the burden of proving matter of excuse or mitigation is upon the accused, not beyond a reasonable doubt, but to the satisfaction of the jury.³ The state is not bound to prove the motive as well as the intent of the defendant.⁴

§ 24. **Accomplice — Corroboration, when necessary.**—When the only proof against a person charged with a criminal offense is the evidence of an accomplice, uncorroborated by such other evidence as tends to connect the defendant with the commission of the crime, it is the duty of the judge to instruct the jury that they should acquit.⁵

§ 25. **Who are not accomplices.**—A person who purchases liquor of a person who has no license to sell is not an accomplice. He does not participate in the act declared by the statute to be an offense. An accomplice is a person involved either directly or indirectly in the commission of the crime. To render him such, he must in some manner aid or assist or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party by reason of the criminal transaction.⁶ So a person who buys lottery tickets for the purpose of proving the fact of their sale by the

¹ *Com. v. Holmes*, 157 Mass. 233; 625; *Wilkins v. State* (Ala.), 13 S. Rep. 312.
State v. Henderson (Oreg.), 32 Pac. Rep. 1030; *Low v. State* (Tex.), 20

S. W. Rep. 366; *State v. Bradley*, 64 Vt. 466; *Snodgrass v. Com.* (Va.), 17 S. E. Rep. 238; *Pace v. State* (Tex.), 20 S. W. Rep. 762.

² *Com. v. Straesser*, 153 Pa. St. 451.

³ *State v. Whitson*, 111 N. C. 659; *State v. Crawford* (Mo.), 22 S. W. Rep. 371; *People v. Wolf*, 95 Mich.

⁴ *State v. Workman*, 39 S. C. 122.

⁵ 1 Greenl. Ev., § 380.

⁶ *Com. v. Willard*, 22 Pick. 476; *Campbell v. Com.*, 84 Pa. St. 187; *State v. McKean*, 36 Iowa. 343; *Trustees, etc. v. O'Malley*, 18 Ill. 407; *Smith v. State*, 37 Ala. (N. S.) 472; *People v. Farrell*, 30 Cal. 316; *People v. Smith*, 28 Hun, 626.

defendant is not an accomplice.¹ Indeed, it has become a necessity for the suppression of crime to resort to this mode of ascertaining whether a prohibited and criminal act may be committed, the victims of a business which it distinguishes failing in the moral courage to complain or to appear as witnesses. Without its use many crimes would increase in number and magnitude, the law be openly violated, and the authorities helpless from the absence of such proof as may be required for a conviction. The utmost that can be said of the person employed is that he is an informer, and leave to the jury the consideration of his evidence as such.²

V. FALSE IMPRISONMENT — MALICE.

In an action for false imprisonment the plaintiff cannot show malice on the part of the defendant, malice not being an element of false imprisonment.³

VI. JUDGMENTS.

All judgments whatsoever are conclusive proof as against all persons of the existence of that state of things which they actually effect, when the existence of the state of things so effected is a fact in issue or is deemed to be relevant to the issue.⁴

VII. RES ADJUDICATA.

§ 26. **In general.**— Sir J. Stephen, in his Digest of the Law of Evidence,⁵ states the rule of *res adjudicata* as follows: "Every judgment is conclusive proof, as against parties and privies, of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based, unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved."⁶ The construction of a contract in an

¹ Reg. v. Mullins, 3 Cox's Crim. Cas. 526; People v. Farrell, 30 Cal. 316; 590; Key v. Dent, 14 Md. 86; Leggett v. Tullervey, 14 Ex. 301.

² People v. Noelke, 29 Hun, 461.

⁵ Arts. 41, 43, 44, 47.

³ Hewitt v. Newberger, 48 N. Y. State Rep. 812. But see Reynolds v. Haywood et al., 59 id. 47.

⁶ Cromwell v. County of Sac, 94 U. S. 351; Blair v. Bartlett, 75 N. Y. 150; Rose. N. P. 128.

action between the parties, or an adjudication on the construction of a statute, is conclusive on them in another action.¹ Where the parties and the cause of action are the same, the presumption is that the questions presented for decision were the same.² The party producing the former adjudication must show that the subject was directly in issue in the former suit.³

§ 27. **Not pleaded.**—If a judgment is not pleaded by way of estoppel it is, as between parties and privies, deemed to be a relevant fact whenever any matter which was or might have been decided in the action in which it was given is in issue, or is deemed to be relevant to the issue in any subsequent proceeding. Such a judgment is conclusive proof of the facts which it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as an estoppel.⁴

§ 28. **Between strangers.**—Statements contained in judgments as to the facts upon which the judgment is based are deemed to be irrelevant as between strangers, or as between a party or privy and a stranger, except in the case of judgments of courts of admiralty condemning a ship or prize, and other judgments *in rem* by courts exercising a rightful jurisdiction over the subject-matter. In such cases the judgment is conclusive proof as against all persons of the facts on which it proceeded when such fact is plainly stated upon the face of the sentence.⁵ “Judgments are not deemed to be relevant as rendering probable facts which may be inferred from their existence, but which they neither state nor decide as between strangers; as between parties and privies in suits where the issue is different, even though they relate to the same occurrence or subject-matter; or in favor of strangers against parties or privies. But a judgment is deemed to be relevant as between strangers if it is an admission, or if it relates to a matter of public or general interest, so as to be a statement.”

¹ Wood v. Mayor, etc., 73 N. Y. 556;
Tioga R. R. Co. v. Blossburg & C. R.
R. Co., 20 Wall. 137.

² Gould v. Evansville & C. R. R.
Co., 91 U. S. 526; Packet Co. v.
Sickles, 5 Wall. 593.

³ Lawrence v. Hunt, 10 Wend. 81.

⁴ Krekler v. Ritter, 62 N. Y. 372;
Rosc. N. P. 205.

⁵ Booth v. Powers, 56 N. Y. 22.

"Foreign judgments, so far as such judgments can be enforced in this country, stand upon the same footing as domestic judgments." The term "parties" includes all who have a direct interest in the subject-matter of the suit, or have a right to make a defense, or control the proceedings.¹

§ 29. **Adjudication.**—The rule is applicable to judgments at law and in equity, to judgments by default and by confession;² but not to a nonsuit or demurrer.³ A demurrer followed by judgment on the merits is a bar.⁴ A report, order, finding or verdict is not an adjudication. The judgment roll or a certified copy of the record is the best evidence, and must be produced or accounted for.⁵

§ 30. **Parol evidence to show.**—Extrinsic evidence may be given to show what was at issue, litigated or determined, when the record does not disclose such fact.⁶ Thus, parol evidence is competent to show the day of adjudication;⁷ to show the evidence given on the issue;⁸ upon what issue the verdict was based;⁹ that the causes of action are the same.

§ 31. **Defenses.**—"The party against whom a judgment is offered as evidence, not as a counter-claim, may prove that the court which gave it had no jurisdiction, or that it was a fictitious suit, or that it has been reversed, or, if he is a stranger to it, that it was obtained by fraud or collusion, to which neither he nor any person to whom he is privy was a party."¹⁰

§ 32. **Surrogate's decree.**—In an action to set aside a deed on the ground of the mental incapacity of the grantor at the time of its execution, the decree of the surrogate refusing to admit to probate the will of the grantor, executed the same day as the deed, under the objection of the grantee that the executor was mentally incompetent to make such will, is,

¹ *Hates v. Stanton*, 1 Duer, 79; 1 Big. on Est. 47; *Thompson v. Roberts*, 24 How. (U. S.) 233.

² Big. on Est. 18; *Dickson v. Wilkinson*, 3 How. (U. S.) 57.

³ *Wheeler v. Rickman*, 51 N. Y. 391; *Durant v. Essex Co.*, 7 Wall. 107.

⁴ *Aurora City v. West*, 7 Wall. 82.

⁵ *Krekler v. Ritter*, 62 N. Y. 372; *Davidson v. Gardner*, 10 N. J. L. 280.

⁶ *Davis v. Brown*, 94 U. S. 423; *White v. Madison*, 26 N. Y. 117; *Kerr v. Hayes*, 35 id. 331.

⁷ *Packet Co. v. Sickles*, 5 Wall. 592.

⁸ *State v. Thompson*, 19 Iowa, 299.

⁹ *Washington & C. S. P. Co. v. Sickles*, 24 How. (U. S.) 333.

¹⁰ 2 Phil. Ev. 35; *Mandeville v. Reynolds*, 68 N. Y. 528; *Verplank v. Van Buren*, 76 id. 247.

while *prima facie* evidence of the matters adjudged in it, not absolutely conclusive as an estoppel against such grantee.¹

§ 33. **Judgment in criminal case not evidence in civil case.**— A verdict and judgment in a criminal case cannot be given in evidence in a civil action to establish the facts upon which it is rendered.²

VIII. ESTOPPEL.

§ 34. **In general.**— Sir J. Stephen, in his Digest of the Law of Evidence,³ states the rules of estoppel as follows: “When one person, by anything which he says or does, or abstains from doing or saying, intentionally causes or permits another person to believe a thing to be true, and to act upon such belief otherwise than but for that belief he would have acted, neither the person first mentioned nor his representative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing.”⁴ “When any person under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud, of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the person was led by such fraud to believe him to act.”⁵ “No tenant and no person claiming through any tenant of any land or hereditament of which he has been let into possession, or for which he has paid rent, is, till he has given up possession, permitted to deny that the landlord had, at the time when the tenant was let into possession or paid the rent, a title to such land or hereditament;⁶ and no person who

¹ *Baxter v. Baxter*, 57 N. Y. State Rep. 458.

² *People v. Rohrs*, 16 N. Y. State Rep. 782.

³ Arts. 102–105.

⁴ *Barnard v. Campbell*, 55 N. Y. 456, 462; *Rice v. Barrett*, 116 Mass. 312; *Zuchtman v. Roberts*, 109 id. 53, 54.

⁵ *Pickard v. Sears*, 6 A. & E. 469, 474; *Freeman v. Cooke*, 2 Ex. 661; *Howard v. Hudson*, 2 E. & B. 1; *Chapman v. Rose*, 56 N. Y. 137, 140; *Putnam v. Sullivan*, 4 Mass. 45, 53.

⁶ *Doe v. Barton*, 11 A. & E. 307; *Doe v. Smyth*, 4 M. & S. 347; *Doe v. Pegg*, 1 T. R. 760; *Miller v. Long*, 99 Mass. 13; *Haws v. Shaw*, 100 id.

came upon any land by the license of the person in possession thereof is, whilst he remains on it, permitted to deny that such person had a title to such possession at the time when such license was given.”¹ “No acceptor of a bill of exchange is permitted to deny the signature of the drawer or his capacity to draw, or, if the bill is payable to the order of the drawer, his capacity to indorse the bill, though he may deny the fact of the indorsement;”² nor, if the bill be drawn by procuration, the authority of the agent, by whom it purports to be drawn, to draw in the name of the principal,³ though he may deny his authority to indorse it.”⁴ “No bailee, agent or licensee is permitted to deny that the bailor, principal or licensor, by whom any goods were intrusted to any of them respectively, was entitled to those goods at the time when they were so intrusted. Provided that such bailee, agent or licensee may show that he was compelled to deliver up any such goods to some person who had a right to them as against his bailor, principal or licensor, or that his bailor, principal or licensor wrongfully, and without notice to the bailee, agent or licensee, obtained the goods from a third person who has claimed them from such bailee, agent or licensee.”⁵

§ 35. Insurance — Preliminary proof not conclusive.—

The preliminary proofs of loss, in an action upon a policy of insurance, are not conclusive upon the claimant. Nothing but a technical estoppel will shut out the truth.⁶ The statements contained in preliminary proofs of loss do not create an estoppel, because all the essential requirements thereof are wanting.⁷ The statements made by an assured on the proofs of loss are admissible, and may be considered by the jury for

187; *Whalin v. White*, 25 N. Y. 462, 468.

¹ *Doe v. Baytup*, 3 A. & E. 188; *Kinsman v. Parkhurst*, 18 How. (U. S.) 289, 292; *Glynn v. George*, 20 N. H. 114.

² *Garland v. Jacomb*, L. R. 8 Ex. 216.

³ *Sanderson v. Coleman*, 4 M. & G. 209.

⁴ *Robinson v. Yarrow*, 7 Taunt. 455; 1 *Parsons on Notes & Bills*, ch. 9, § 5, p. 320.

⁵ *Dixon v. Hammond*, 2 B. & A. 313; *Crossley v. Dixon*, 10 H. L. C. 293; *Gosling v. Birnie*, 7 Bing. 339; *Hardman v. Wilcox*, 9 id. 382; *Biddle v. Bond*, 34 L. J. Q. B. 137; *Wilson v. Anderton*, 1 B. & Ad. 450; *Rogers v. Weir*, 34 N. Y. 463; *King v. Richards*, 6 Whart. 418, 421.

⁶ *Phillips v. Insurance Co.*, 56 Hun. 640; 31 N. Y. State Rep. 639; *Cluffy v. Insurance Co.*, 99 Mass. 317.

⁷ *Smith v. Ferris*, 1 Daly, 18.

what they are worth; but the party furnishing them may show that statements in the proofs were erroneous or inadvertently made.¹

§ 36. In relation to bona fide purchasers of commercial paper.—Those who seek to secure the advantages which the commercial law confers upon the holders of bank bills and negotiable paper must bring themselves within the conditions which the law prescribes to establish the character of a *bona fide* holder. They are entitled to the benefits of that rule only when they have purchased such paper in good faith, in the usual course of business, before maturity, for full value, and without notice of any facts affecting the validity of the paper. The fact that a party took paper before maturity and paid the full value thereof, in the absence of other facts, undoubtedly affords a presumption of the good faith of the transaction. But where it appears that such paper has been fraudulently or illegally obtained from its owner or maker, and under such circumstances that the person putting it in circulation could not maintain an action thereon, it is incumbent upon the holder, in order to succeed, to go farther and show the circumstances under which it came into his possession, and that he has acted in good faith in the transaction. What constitutes good faith in such transactions has been the subject of frequent discussion in the books; and while differences of opinion may exist on some points, there is perfect uniformity among them upon the point that a want of good faith in the transaction is fatal to the title of the holder, and that gross carelessness, although not of itself sufficient, as a question of law, to defeat title, constitutes evidence of bad faith. The requirement of good faith is expressed in the very term by which a holder is protected, and is fundamental in the maintenance of the character claimed to be protected.² The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve the result of bad faith.³

Bad faith is predicated upon a variety of circumstances,

¹ May on Ins. (3d ed.), § 465; *Cushman v. U. S. Ins. Co.*, 70 N. Y. 72; *Goodman v. Harvey*, 4 Ad. & E. 870. *Spencer v. Citizens' Mut. Life Ins. Co.*, 52 N. Y. State Rep. 442. ² 1 Parsons on Notes & Bills, 258; ³ *Murray v. Lardner*, 2 Wall. 121.

some of them slight in character and others of more significance. A perfectly upright, honest man might sell a note which had been stolen, and the explanation might prevent even the taint of wrong on his part; while the explanation, although falling far short of proof of actual guilt, might leave upon the mind an apprehension that he either directly or impliedly connived at the wrong, or at least was willing to deal in securities and keep his eyes and ears closed so that he should not ascertain the real truth. In *Hall v. Wilson*¹ the court defined the conditions necessary to render a person a *bona fide* holder within the meaning of the mercantile law in the following language: "To entitle the holder of negotiable securities which have been fraudulently, feloniously, or without consideration, obtained and put in circulation, to the benefit of this rule, he must have become such holder in good faith for a full and fair consideration, and in the usual course of business, and without notice of the defect or infirmity in the title. A sufficient number of authorities have been cited to show how the uniformity with which the cases in the highest courts of the country hold that, upon proof by the defendant that his obligations have been fraudulently or illegally obtained and put in circulation, the person seeking to recover upon them must show not only that he bought before maturity and paid value, but also the circumstances under which he acquired the paper, with the view of enabling the jury to determine whether he acted in good faith or not." It makes no difference in the question whether the plaintiff pursues the orderly course of first presenting and proving his note, relying upon the presumption of *bona fides* which accompanies the possession of the paper, and delays making proof of the circumstances of his purchase until after the defendant gives evidence of his defense, or makes the proof of such circumstances a part of his affirmative case. The burden of making out good faith is always upon the party asserting his title as a *bona fide* holder in a case when the proof shows that the paper has been fraudulently, feloniously or illegally obtained from its maker or owner. Such a party makes out his title by presumptions until it is impeached by

¹ 16 Barb. 548.

evidence showing the paper had a fraudulent inception, and when this is done the plaintiff can no longer rest upon the presumption, but must show affirmatively his good faith.¹ When a note is purchased for less than its face of a person who obtained it by fraud or without consideration, it is void for usury within the doctrine of *Hall v. Wilson*,² except as against a national bank. As against such a bank the forfeiture is limited to the interest. As a general rule the indorsement of a negotiable note is in itself *prima facie* evidence that the indorsee has paid value for it; but when the payee or indorsee has procured the note by fraud, this presumption is rebutted and the holder cannot recover without proving that he has paid value.³ In an action upon a promissory note brought by an indorsee thereof, where the defense is that it was procured by false representations, the testimony of the plaintiff that he obtained the note for value is not conclusive evidence against the defendant of the existence of that fact. The defendant has the right to have the question of plaintiff's credibility submitted to the jury, and to insist upon it that the plaintiff's evidence does not establish the truth of the statement made. That is the rule in all cases where a vital fact may depend upon the testimony either of a party or an interested witness.

¹ *Canajoharie Nat. Bank v. Diefendorf*, 33 N. Y. State Rep. 289; *Franc v. Dickinson*, 34 id. 864. N. Y. 549; *Kavanagh v. Wilson*, 70 N. Y. 177; *Rochester, etc. Co. v. Loomis*, 45 Hun, 94; 9 N. Y. State Rep. 592; *Honegger v. Wettstein*, 94 N. Y. 252; *Pelly v. Onderdonk*, 40 N. Y. State Rep. 648.

² 16 Barb. 550.

³ 1 Dan. on Neg. Inst. 612.

⁴ *Elwood v. Western U. T. Co.*, 45 N. Y. State Rep. 648.

INDEX.

The references are to pages.

ABSENCE —

- absentees, who are, 443.
- at sea, presumed to be dead when, 444.
- presumption of death before seven years, 444.
- presumption of death, when, 442.
- rebutting this presumption, 446.

ABSENTEES —

- presumed to be dead when, 445.
- presumption of death before seven years, 444.
- "not been heard of," meaning of, 443.
- residence, meaning of, 444.
- when presumption of death after seven years does not arise, 446.
- who are, 443.

ACCEPTANCE —

- presumed when, 458.

ACCIDENT —

- declaration of agent as to, part of the *res gestæ* when, 326.
- presumption of negligence of common carriers in case of, when, 422.

ACCOMPLICE —

- testimony of, must be corroborated when, 505.

ACCORD AND SATISFACTION —

- must be pleaded when, 28, 29, 30.

ACCOUNTS —

- books of, when primary evidence, 304.

ACCOUNTS STATED —

- implied admission of one receiving, 107.

ACTIONS —

- at law upon sealed instruments, 147.
- in equity, 147.
- sealed instruments may be set aside by parol evidence, 147.

ADEMPTION —

- of legacy, how proved, 257.

ADJUDICATION —

- upon demurrer, not conclusive, 507.
- what is an, 508.

The references are to pages.

ADMINISTRATOR —

declarations of, when part of *res gestæ*, 326.

ADMISSIONS —

after party has parted with his interest, 105.

are only admissible when parol evidence is admissible to establish the fact, 104.

failure to deny, effect of, 25.

implied, what are, 105, 106.

implied, of negligence, 222.

in one's own favor, 117.

in pleadings, effect of, 40.

may be made in behalf of the real party, 103.

of administrators, executors, trustees, etc., 113.

of agents, 109.

must be made in reference to the business in which he was at the time employed, 109.

of assignor as against assignee, 109.

of attorney for client, 112.

of *cestui que trust* as against trustee, 109.

of former owner of choses in action, 111.

of one party for another, 104.

of party in place of writing, 123.

of partners and joint contractors, 112.

of persons referred to by party, 112.

what are, 103.

whole must be taken together, 118.

ADVANCEMENT —

proof necessary to show, 151.

ADVERSE POSSESSION —

hearsay evidence competent to prove, 275, 285.

AFFECTION —

of husband and wife, in criminal conversation, 13.

of parties, in action for breach of promise to marry, 13.

AGE —

a non-expert cannot give his opinion on a question of, 407.

as presumption of survivorship, 447.

declaration as to, 283, 290.

entry in Bible, 283, 290.

may be proved by hearsay, when, 284, 291.

of document, 283, 288.

of infant, 283, 290.

testimony of party to, 285.

AGENCY —

authority of, presumed, 453.

death of principal ends, 327.

foundation for admitting declarations of parties having joint interest, 269, 274.

The references are to pages.

AGENCY (continued) —

- how proved against wife, 264.
- not proved by reputation, 326, 330.
- of conspirators, 348.
- of partners, ended by dissolution of firm, 273.
- of wife, for husband in domestic affairs, presumed, 262.
- once shown to exist is presumed to continue, 438.
- ratification as proof of, 327, 329.

AGENT —

- acts of, in course of business, 458.
- admissions and declarations of, 109, 326, 330.
 - husband and wife, 260, 266, 326, 328.
- admissions and declarations, preliminary proof necessary to admit, 109.
- authority of, to receive payment, 235, 237.
 - presumed from sale, 236.
- authority, implied scope of, 242, 247.
 - ended by death of principal, 269, 274.
 - presumption as to husband's acts for wife, 262.
 - wife's acts for husband, 263.
 - conduct of corporation, 243, 246.
- proved by corporate minutes, 241, 246.
 - ratification, 242, 245.
 - his own testimony, 268, 271.
- when presumed, 458.
- competent as a witness to testify as to personal transactions with deceased person, 80.
- declarations of, when part of the *res gestæ*, must be part of the transaction, 326.
- evidence to show principal in contract of, 151.
- knowledge of, evidence against principal, 243, 247.
- liability of principal for wrongful acts of, 219, 222, 245.
 - malicious acts of, 245, 246.
- notice to, binding on municipal corporation, 244, 247.
 - corporation, 246.
- parol contract by corporation, 244.
- when admissions of, do not bind principal, 109, 326, 330.

ALIBI —

- must be established by defendant, 462.

ALIENAGE —

- how proved, 258.

ALTERATION —

- presumption as to, 434, 436, 456.
- party offering, must explain it, 457.
- raises no presumption that it was made after delivery, 434, 457.

AMBIGUITY —

- latent, 154.
 - as to which of two parcels, 159.
 - explained by parol, 158, 159.

The references are to pages.

AMBIGUITY (continued) —

- latent, explained by declarations of testator, 158, 252, 257.
- in memorandum of sale, 173.
- what is, in contract, 157, 159.
- in construction of will, 159.
- patent, parol evidence not admissible to explain, 160.

ANCESTOR —

- declarations of, as to title, 294.
- incompetent, 281.

ANCIENT DOCUMENTS —

- proof of, 282, 288.
- title under, 288.
- must be made before controversy arose, 280.
- must relate to public matters, 277.
- when matter not susceptible of better evidence, 276.

ANSWER —

- criminating, when witness may refuse to, 44.
- irresponsive in part, remedy of opposite party, 499.
- presumption upon failure to state a fact material to defense in, 436, 438.
- to questions tending to degrade a witness, 48.
- upon cross-examination of defendant in criminal case, 45.
- when physician prohibited from, 57.
- when state officials prohibited from, 60.
- when husband and wife prohibited from, 61.

ANTE LITEM MOTAM —

- declarations must be, 280.

APPOINTMENT —

- of officer, 266.
- may be proved by hearsay when, 278, 281.

ASSENT —

- of minor grantee to the delivery of deed, presumed, 459.

ASSIGNEES —

- declarations of assignor not competent against, when, 333, 338.

ASSIGNMENT —

- absolute in form, may be shown to be for security only, 190, 200.
- by gift *inter vivos*, what necessary to prove, 239.
- by trustee or executor, proof necessary to show, 240.
- carries with it title to collateral security when, 238, 239.
- consideration for, not essential when, 238.
- execution of, how proved, 239.
- equitable, when presumed, 238.
- may be made by parol, 238.
- when written cannot be varied by parol, 183, 190.
- when will be presumed, 238, 240.

The references are to pages.

ASSIGNMENT FOR BENEFIT OF CREDITORS —

- declaration of assignor prior to, competent as against assignee, 339.
- fraudulent acts of assignor competent as against assignee, 340, 347.
- proof necessary to set aside for fraud, 229.

ASSIGNOR —

- declarations of, inadmissible as against interest of assignee, 333, 336.
- before he became owner of the property, 335.
- subsequent to the execution and delivery of a deed, 334.
- when incompetent as a witness in an action by his assignee against the estate of a decedent, 79.

ATTESTING WITNESS —

- documents produced by the opposite party, 121.
- when document is executed by public officer, 122.
- when it is required by law to be registered, 122.
- when, does not recollect or denies the execution of the document, 122.
- when the instrument is duly acknowledged, 122.
- not directly in issue, 122, 129.
- to a will, may give their opinion as to the mental condition of the testator, 386, 390.
- to a will, cannot state whether or not testator had sufficient strength of mind to comprehend the contents of his will, 386, 390.
- writings may be proved by parol, when, 129.

ATTORNEY —

- admission of, for client upon trial, binding, 112.
- out of court, not binding, 112.
- documents and papers protected, 52.
- extent of protection, 50.
- opinion of, protected when, 51.
- privileged communication of, 49, 50.
- protection perpetual when, 53.
- protection waived when, 51, 53.
- what communications are not privileged, 53.
- come within the rule, 50.

AUTHENTICATION OF RECORD —

- an examined copy is, when, 123, 127.
- certified copies are, 124.
- exemplification of, 124.
- judgments of a foreign state, certified, are, 126.
- legislative acts under the seal of the state are, 125.
- public records of a state not judicial, with a certificate of the presiding justice of the court, are, 126.
- records of judicial proceedings of a state under the seal of the court are, 125.
- records of the nation under the seal of the department are, when, 124.

The references are to pages.

AUTHORITY —

- may be shown by hearsay evidence when, 275, 279.
- official acts, presumptions of, 428.
- proof of official capacity, 428.

B.

BAD CHARACTER —

- how shown, 17, 20.
- mode of proving, 22.
- of a party, irrelevant to an inquiry respecting his conduct, 15.
- when in issue, relevant, 16.

BANK BOOK —

- check drawn on, evidence of payment, 315.

BAPTISM —

- may be proved by hearsay when, 284.
- registry of, as proof of birth, 287.

BEER —

- in the absence of all evidence, does not import an intoxicating beverage, 93.

BELIEF —

- of witnesses, when competent, 364, 370.
- proved how, 363, 375.

BEST EVIDENCE —

- opinions are, when no other can be obtained, 257, 260.
- what is, 175.

BIBLE —

- family record in, 287

BILL OF LADING —

- explanation of, 191.
- what part cannot be varied by parol, 192.

BILL OF SALE —

- parol to identify thing, 151.
- parol to vary consideration, 192.
- when cannot be varied by parol, 193.
- when may be varied by parol, 193.

BILLS AND NOTES —

- bona fide* purchaser of negotiable, protected when, 511, 513.
- cannot be varied or altered by a prior or contemporaneous parol agreement, 188.
- evidence of the real relations of the parties to, admissible, 190.
- it is presumed that the holder of, is a *bona fide* holder for value, 432.
- that they were transferred to plaintiff on the day of their date, 432.
- that they are indorsed before due, 432.

The references are to pages.

BILLS AND NOTES (continued) —

- may be shown to have been delivered upon conditions, 153, 201, 203.
- payment by check, 235, 237.
- payment by note of third person or debtor, 237.
- when negotiable, presumed to have been regularly negotiated, 431, 435.

BIRTH —

- proved by hearsay, 283, 290.
- proved by registry of baptism, 290.

BONA FIDE —

- assignee for value not affected by declarations of assignor, 339.
- burden of proof upon defendant to show that he is a, purchaser, 212, 229, 234.
- holder of negotiable paper, 511, 513.
- purchaser of commercial paper protected when, 512.
- what must be shown by, 511, 513.

BONDS —

- alteration of, presumed to have been made before execution, 456.

BOOKS —

- entries in, of births, marriages and deaths, 290.
- of history, evidence of matters of public and general interest when the author is dead, 276, 283.
- of history, ancient only accepted, 282.
- of science, 315.

BOOKS AND PAPERS —

- of corporations, 316.
- against whom competent, 318.
- authentication of, 316, 319.
- evidence by and against whom, 317, 319.
- how must be proved, 316, 319.
- records of corporations evidence when, 246.

BOOKS OF ACCOUNT —

- admissible in favor of party keeping them, 304, 307.
- of cash transactions, not competent evidence, 304.
- must be confined to transactions in the ordinary course of business, 305.
- must show that party kept no clerk, 304.
- that party kept fair and honest accounts, 305.
- that some article or service charged was actually furnished, 306.
- time of entry in, material, 307.
- what must be shown to make them original evidence, 304.

BOUNDARIES —

- deceased surveyor's declarations of, competent to prove, 296.
- declaration as to, when competent, 275, 282.
- declarations of surveyor competent to prove, when, 296.
- maps of surveys, proof of, when, 294.
- owner's declarations may be given when, 296.
- perambulations, evidence of, when, 295.
- private, evidence to establish, 295.

The references are to pages.

BREACH —

of promise of marriage :

reputation of defendant's wealth competent in action for, 489.

witness may be asked how certain things affected plaintiff in an action for, 13.

BURDEN OF PROOF —

acts and declarations of executors and administrators, 247.

ademption and lapsing, 257.

advancements, 250.

agency of husband for wife, assignment, 262.

books and papers of corporation, 246.

citizenship and alienage, 258.

consideration, 238.

constructive fraud, 234.

continuous fraudulent transactions, 225.

contracts of corporation, 244.

conversion, demand in action for, 212, 229.

contributory negligence must be proved by whom, 220.

death, 259.

execution and delivery of gift, 239.

executors and administrators, title of, 247.

existence of corporation, 240, 243.

estoppel by and against, 243.

exceptions, waiver, conditions, etc., must be proved by whom, 213.

fictitious consideration fraudulently made up, 228.

frauds do away with written instrument, 226.

fraud, sufficiency of proof to carry case to the jury, 224.

gift, 239.

illegality of contract, 232.

in actions against telegraph companies, 224.

innocence, presumption of in civil cases, 225.

intent, when party may swear to, 226.

issue and legitimacy, 261.

lies with whom, 211, 215.

limitation of action must be proved by whom, 217.

marriage, 260.

negligence must be proved by whom, 218, 222.

negligence or wrongful acts committed abroad must be proved by whom, 222.

payment, 235.

partners and joint contractors, 269.

proof of partnership, 269.

proof of dissolution of partnership, 273.

penalties must be proved how, 216.

powers of corporation, 244.

preponderance of proof sufficient, 214.

remains with whom, 212, 228.

sufficient evidence to go to the jury, 214, 224.

The references are to pages.

BURDEN OF PROOF (continued) —

- title of husband and wife, 260.
- title to public office, 266.
- torts of corporation, 245.
- to set aside assignment for creditors, 229.
- usury, 233.
- wife's title to property, 263.

BUSINESS —

- entry made in usual course of, 302.
- knowledge of custom by, engaged in, 161, 415.
- memoranda made in the usual course of, primary evidence when, 303.

BY-LAWS —

- of corporation, evidence by and against whom, 316, 317.

C.

CANCELLATION —

- of will, declarations of testator competent when, 355.

CARGO —

- parol to explain meaning of, in contract, 191.

CERTIFICATE —

- of officer, competent in his own favor when, 266, 268.

CERTIFIED COPIES —

- of records, 124.
- primary evidence when, 125.

CHARACTER —

- of party, when irrelevant, 15.
- evidence of, important in criminal actions, 461.
- form of question as to, in criminal cases, 16.
- in civil cases, 17.
- inquiry as to, in cross-examination, 17.
- is presumed to continue as proved to be in time past, 441.
- is relevant for defendant in criminal cases, 15.
- is relevant when put in issue, 15.
- number of witnesses upon, limited, 17.
- prisoner's, cannot be put in issue by the state, 16.
- proof of corroborating declarations, 18.
- sustaining evidence of, 18.
- when in issue, 22.
- how to be proved, 16.
- when put in issue, evidence of particular facts may be admitted, 16.
- witness must be acquainted with person's general, 16.

CHARTERS —

- of corporations, 240, 243.
- acceptance of, how proved, 241.
- minutes of corporations to prove acceptance, 242.
- user, without formal acceptance, 240, 244.

The references are to pages.

CHATELS —

declarations of vendor incompetent as against vendee when, 334, 336.
possession presumption of ownership, 459.

CHECK —

stubs of, evidence when, 315.

CHILDREN —

advancements to, presumption of, 250.
birth of, may be proved by hearsay evidence, 284, 290.
legitimacy, presumption of, 436.

CIRCUMSTANCES —

and presumptions, difference between, 412.
inflexible proof when, 413.
surrounding parties in interpretation of their contracts, 148, 172.
surrounding party at the time of making and delivery of contract, 176.

CIRCUMSTANTIAL EVIDENCE —

affectation of grief and fabrication of evidence, 470.
proof of cause of death by, 464.
 of infanticide by, 464.
 of motive by, 466.
 of spoliation of evidence, 470.

COHABITATION —

alone, not sufficient to prove marriage, 436.
as proof of marriage, 436.
hearsay evidence of, admissible, 286.

COLLATERAL AGREEMENT —

by lessor to make repairs before term, 198.
is competent to show independent contract relating to the same subject-matter subsequently made, 192.
may be proved by parol when, 195, 200.

COLLATERAL FACTS —

cross-examination as to, for the purpose of contradicting, not allowed when, 20.
cross-examination to show the temper, disposition or conduct of a witness, 20.

CLERGYMAN —

privileged communication of, 59.

CLERK —

entries made by, 302, 306.

COMMON CARRIERS —

presumptions as to negligence of, 422, 423.
 as to passengers, 423.
 as to, in an accident case, 422.
 as to contributory negligence, 425.
 as to loss of property, 426.

COMMON EXPERIENCE —

courts take judicial notice of, 90.

The references are to pages.

COMMON LAW —

presumed to exist in all countries that have been subject to England, 454.

COMMUNICATION —

between counsel and client, 49.
 husband and wife, 73, 74.
 physician and patients, 55.
 state officials, 60.
 with deceased, 77, 84, 85.

COMPARISON OF HANDWRITING, 399, 403.

COMPETENCY —

communications between attorney and client, 49.
 communications between physician and patients, 57, 58.
 confidential communications between husband and wife, 61, 62.
 declarations of attorney out of court, 112.
 of administrator or executor as to past transactions, 113.
 of a former owner of choses in action, 111.
 of one in his own favor, 117.
 of wife while leaving husband's house, 13.
 definition of, 3.
 evidence must be within the issue, 8.
 employee may state that he was not acting in the course of his employment, 13.
 matters pending suit may be shown when, 11.
 offer of settlement or compromise, 64.
 proof of corroborating declarations, 18.
 testimony of husband and wife in criminal actions, 73, 74.
 of lunatic or idiot, 71.
 of person convicted of crime, 72.
 witness may explain inconsistencies between testimony and pleading, 42.
 may be asked whether he intended to do a thing correctly, 14.
 may be asked for what reasons he did not do certain things, 13.
 may state effect produced upon, by certain letters, 13.
 may state how certain acts affected or seemed to affect a party, 13.

COMPLAINTS OF SUFFERING —

by party sick or injured, competent when, 330, 333.

COMPROMISE —

admissions pending, 64, 65.
 offer of, when privileged, 64.
 when not privileged, 65.

CONDITION —

annexing of, to the delivery, not a contradiction of instrument, 201, 204.
 burden of proof of, remains with whom, 212, 215.
 of delivery of contract, may be proved by parol, 201.
 of party injured, may be shown by his exclamations, 330, 333.
 precedent may be shown to vitiate instrument, 202, 204.

The references are to pages.

CONDUCT —

as evidence, 466, 470.

CONFESSIONS —

facts discovered in consequence of, 115.

judicial, what are, 114.

made in consequence of deception, 115.

made under promise of secrecy, 115.

made when confessor was drunk, 115.

must be voluntary, 114.

what are, 114.

when caused by threat, inducement or promise proceeding from a person in authority, 115.

CONFIDENTIAL COMMUNICATIONS —

between husband and wife, 61, 63.

CONSIDERATION —

want of, may be shown to vitiate written instrument, 143.

when, of written contract may be shown to be different, 179.

CONSPIRACY —

evidence of, necessary when, 384.

what constitutes, 349.

CONSPIRATORS —

declarations of, after wrongful acts have been done, 350.

before conspiracy was complete, 349.

one against the others, 350.

narratives of some part of the transaction admissible, 351.

what foundation must be laid for admission of declarations of, 348, 351.

CONSTRUCTION —

of instrument, 176, 179.

subsequent action and conduct of parties admissible, 192.

surrounding circumstances admissible in, 176, 185.

CONSTRUCTIVE FRAUD —

burden of proof lies with whom, 234.

will be presumed when, 448.

CONTEMPORANEOUS ORAL CONTRACT —

is presumed to be merged in written, 145.

where instrument on its face appears to be, though not in fact complete, 145.

when writing relates only to part of such agreement, 146.

when writing shows that it does not embody the entire contract, 146.

CONTRACT —

alteration in, presumed to have been made before execution, 456.

dates of, presumed to be correct, 434.

parol evidence to complete an entire, of which a writing is only a part, 182, 186.

parol evidence to show condition precedent, 143.

presumed to have been delivered on the day it bears date, 434.

subsequent changes of written, may be shown by parol, 192.

The references are to pages.

CONTRIBUTORY NEGLIGENCE —

- burden of proof lies with whom, 220, 424, 427.
- in actions between master and servant, 221.
- in actions by passenger in sleeping-car for loss of money, 222.
- presumption of, 422, 426.

CONVERSION —

- proof of demand necessary when, 229.

CONVEYANCE —

- condition upon which delivered may be shown by parol, 201.
- lawful origin, when presumed, 460.
- presumed to have been delivered when, 459.

COPY —

- equivalent to exemplification, 124.

COPYRIGHT —

- burden of proof as to, 213, 218.

CORPORATION —

- accounts and business entries of, are competent between whom, 316.
- books and papers of, evidence against, 240, 244, 317.
- charter or statute best evidence of legislative sanction, 241.
- contracts of, how shown, 244.
- incorporation of, by laws of several states, 242.
- de facto*, how proved, 240.
- existence of, how proved, 241.
- acceptance of charter, how proved, 243.
- estoppel by and against, 243.
- legislative sanction, how proved, 241, 245.
- minutes of, proved by parol, 318.
- may be varied by parol, 319.
- power of, how proved, 244.
- proof of charter from foreign state, 242, 246.
- proof necessary in actions by state to put an end to, 240, 248.
- records of, evidence against whom, 316, 319.
- torts of, how proved, 245.

COUNTER-CLAIM —

- attacking an instrument set up as, 41.

COUNTERPART —

- original evidence, 121, 130.

COURSE OF BUSINESS —

- presumption that the usual, was followed, 429.

CREDIT —

- of witness, 15, 20.
- presumption of, rebutted how, 7.

CREDITOR —

- evidence of poverty of, to disprove debt, 7.

The references are to pages.

CRIMINAL —

character of, cannot be put in issue by the state, 16.

CRIMINAL ACTION —

insanity of defendant, how proved in, 502.

malice, how proved in, 501.

other crimes may be shown to prove motive, 501.

presumptions against crime in, 460, 462.

prosecution must prove in infanticide that the child was born alive,
464.

must prove motive, 466.

must prove the cause of death, 464.

must prove the *corpus delicti*, 463.

slight evidence competent when, 501.

testimony of accomplice must be corroborated when, 505.

threats by deceased competent, 504.

threats by defendant competent, 504.

cross-examination of a defendant limited to matters called out on direct
examination, 45, 46, 47.

good character of, is always competent, 16.

when incompetent witnesses, 72, 73.

CRIMINATING ANSWERS —

cross-examination of defendant in a criminal case, 45.

what are, 44.

when witness is exempt by statute from liability, effect of, 44.

when witness judge of, 44.

when witness may waive his privilege of refusing, 44.

CROSS-EXAMINATION —

as to collateral facts for the purpose of impeachment, not allowed, 20.

extent of, upon questions of character and reputation, 17

leading questions allowed upon, 493.

limit as to extent as to whole conversation, when, 495.

of a defendant when he offers himself as a witness in a criminal case,
45, 46, 47.

when defendant may cross-examine his own witnesses, 493.

CUSTOM —

adding instrument to contract by, 172.

evidence of, not admissible unless pleaded, 25.

how established, 167.

local notice of, must be shown, 168.

may be annexed to written instrument by parol, 161, 171.

meaning of, interpreted, 161.

must be certain and reasonable, 166.

must not be inconsistent with written contract, 167.

must be proved by the multiplication or aggregation of a great number
of instances, 162.

qualities of, 166.

when not necessarily general, 167.

The references are to pages.

D.

DAMAGES —

- a witness cannot be asked how much less property was worth after certain things happened, 475, 479.
- a witness cannot testify to the amount of, 474, 480.
- benefits to premises, when allowed, 488.
- exemplary, how shown, 216, 218.
- expert opinions upon the question, 474.
- for sale of liquor, burden of proof is upon party alleging, 215.
- malice cannot be shown in action for false imprisonment, 506.
- offer made for property not allowed when, 481.
- price paid upon sales, evidence of, 482.
- proof allowed where there is no market value, 487.
- proof of value in action on special contract, 488.
- proof of pecuniary condition of party allowed when, 488.
- proof of reputation in libel, when allowed, 489.
- proof of reputation in libel after action commenced, not allowed, 490.
- reputation of defendant's wealth in action for breach of promise of marriage, 489.
- sales or value of other property incompetent when, 483, 486.
- special, must be alleged in pleading, 29.
- sum inserted in deed not evidence of value, 486.
- value of work, labor and services, how proved, 487.
- when the law presumes, 474.
- who may testify as to value, 474, 484.

DATE —

- of book entries not relating to the suit may be testified to by witness, 404, 407.
- of death, presumption of, 444, 450.
- of death shown by registers, 290.
- of writing, parol evidence to show, 149, 156.
- presumption as to correctness of, 434.

DEAF AND DUMB PERSON —

- competent as a witness, 66, 67.

DEATH —

- effect of, upon competency of other party to testify as witness, 76, 77.
- assignors and grantors, 79.
- heirs, legatees and distributees, 80.
- may be proved by hearsay when, 283, 290.
- presumption of, and of time of, 442.
- from voyage and special peril, 446, 447.
- presumption of, from seven years' absence, 444.
- presumption of, before seven years, 444.
- proved by registry of, 290.
- rebutting presumption of, from absence, 259, 443, 445.

The references are to pages.

DEATH (continued)—

- survivorship in common casualty, 447.
- survivorship of husband and wife, presumption of, 446.
- time of, presumed, 259, 442.
- when presumption of, after seven years does not arise, 446.
- without issue, presumption of, 442, 450.
- without issue under age, not presumption of, 442, 450.

DEBT —

- barred by statute of limitation, 217.
- discharge from, must be set up in pleadings, 28.
- evidence of poverty of creditor to disprove, 7.
- extinguished by lapse of time, 451.
- new promise or acknowledgment of, 218.
- payment shown by circumstantial evidence, 236.

DECEIT —

- declaration of assignor for benefit of creditors good against assignee, 339.
- person presumed to act honestly, 434.

DECLARATIONS —

- as to facts of family history, competent when, 285, 287.
 - by whom must be proved, 283, 290.
 - competent to prove marriage when, 286.
- as to matters of public and general interest, competent, 277, 280.
- as to pedigree, 283, 287.
- in one's own favor, competent when, 117.
- made in view of controversy, incompetent, 289.
- must be *ante litem motam*, 280.
- of administrator as against the estate, incompetent when, 113.
- of agent, competent when, 13, 109.
 - incompetent when, 109.
 - when part of the *res gestæ*, 326, 328.
- of assignor against assignee, 333.
- of assignor for benefit of creditors prior to assignment, 339, 343.
- of conspirator against co-conspirator, 348, 350.
- of donor as to gift, 302.
- of joint contractors, 112, 113.
- of one partner as against another, competent when, 112, 113.
 - incompetent when, 112, 113.
- of owner as to ownership, 299, 302.
- of party as to mental or bodily suffering, 330, 336.
- of party to show state of mind, 13.
- of principal against surety, 110.
- of testator as to will, 302.
 - before execution of will, 354, 355.
 - after execution of will, 355.
 - to show revocation of will, 354.
- of vendor as against vendee, 336.

The references are to pages.

DECLARATIONS (continued) —

- of wife leaving husband's house, competent against him, 13.
- post litem motam*, 281.
- prior, out of court, to corroborate, 7, 12.
- proof of corroborating, when competent, 18.
- to show intent, 352.
- when part of *res gestæ*, 322, 348.
- when rights must be ancient and declarant dead, 279.
- whole must be taken together, 118.

DECLARATIONS AGAINST INTEREST —

- admissible when, 299, 303.
- condition precedent, 300.
- of deceased grantor, 301.
- of decedent against his representatives, 301.
- of testator as to contents of will, 302.

DECREE —

- not absolutely conclusive as estoppel against grantee, 508.
- of surrogate, *prima facie* evidence of the matter adjudged in it, 508.

DEED —

- ancient, proves itself when, 293, 295.
- assent of grantee in. presumed, 453.
- cannot be contradicted by parol, 201.
- delivery of, presumed when, 456.
- parol to explain, 176, 190.
- presumed to be delivered on the day of its date, 450.
- when may be shown to have been intended as a mortgage, 200.

DEFENDANT —

- cross-examination of, when he offers himself as a witness in a criminal case, 45.
- evidence against one of two or more, 11.
- questions by a co-defendant may be objected to by, 499.

DEFENSES —

- burden of proof of avoidance, 229, 233.
- of forfeiture, 233.
- of usury, 231, 234.
- of, is upon party setting up, 229, 233.
- composition, 29.
- discharged from debts, 28.
- fraud, 31.
- illegality, 30.
- infancy, 29.
- payment, 29.
- performance, 30.
- release, 28.
- res adjudicata*, 27.

The references are to pages.

DEFENSES (continued) —

- statute of limitation, 26.
- that he is a *bona fide* purchaser, 234.
- title in a stranger, 25.
- what may be proved under general issue, 27.

DEFINITION —

- of evidence, in general, 1.
 - circumstantial, 2.
 - competent, 3.
 - conclusive, 3.
 - cumulative, 3.
 - direct, 3.
 - extrinsic, 3.
 - hearsay, 2.
 - moral, 3.
 - negative evidence, 11.
- of custom, 160.
- parol, 2.
- positive, 2.
- presumptive, 2.
- primary, 2.
- relevant, 3.
- satisfactory, 4.
- secondary, 2.

DELIVERY —

- presumed when, 458.

DEMAND —

- proof of, necessary in conversion when, 229.

DEMONSTRATIVE EVIDENCE —

- admissible when, 138, 139.
- exhibition of child in bastardy cases, 139.
 - of injured limb in action for injuries, 139.
 - of underclothing in prosecution for rape, 138.
- illustrations of handwriting on blackboard, 404.

DEPOSITION —

- oral proof of contents of, 137.

DESCRIPTION —

- may be made by demonstrative evidence when, 138, 139.
- by photographs when, 140.

DESTRUCTION —

- fraudulent, of instrument, effect of, 127.
- of will, when presumed, 135, 137, 354.
- voluntary, of written instrument, effect of, 127, 130.

DETECTIVES —

- as witnesses, not deemed accomplices, 505.

The references are to pages.

DEVISEES —

proof necessary to charge with debt of ancestor, 250.

DILIGENCE —

to obtain original evidence, sufficiency of, 130.

DISAPPEARANCE —

presumption of death by, 242, 246.

DISCHARGE —

from debt, 230, 232.

DISEASE —

experts may testify as to what may be the result of, 394, 399.

that certain injuries were the cause of, 395, 397.

that puerperal mania is a common, at child-birth, 395.

DISTANCE —

a witness may state how far one could ordinarily see along a certain road, 379, 384.

may testify as to the rate of speed of a train, 384.

DIVORCE —

innocence will be presumed in actions for, 434, 435.

DOCUMENTS —

ancient, when prove themselves, 288.

dates of, presumed to be correct, 432, 434.

may be shown to have been delivered upon condition, 201, 203.

notice to produce, necessary when, 131.

sufficiency of, 133.

parol evidence of circumstances surrounding making of, 176, 178.

parol evidence to complete an agreement of which a writing is only a part, 182.

presumed to have been delivered upon the day they bear date, 434.

presumptions as to, regular on their face, 434.

public, recitals in, evidence when, 291.

subsequent changes of, can be shown by parol, 192.

that must be produced, 120.

which the law requires to be in writing, 120, 122.

writings the contents of which are disputed, 122.

writings the existence of which are disputed, 121.

executions, 122.

returns on execution, 122.

maps, 122.

warrants, 122.

when consideration mentioned in, may be shown to be different, 179, 183.

when written, may be contradicted, 208, 209.

DOLI CAPAX —

child between the age of seven and fourteen not presumed to be, 450.

child under seven years of age presumed not to be, 450.

The references are to pages.

DOMICILE —

- a person may belong to several places, 258, 259.
- a wife's, is proved how, 258, 259.
- hearsay evidence competent, 283, 290.
- of illegitimate minor, is proved how, 258.
- of legitimate minor, is proved how, 259.
- of person *sui juris*, is proved how, 258.
- of soldiers and sailors, is proved how, 259.
- once shown is presumed to continue, 438.
- when residence is equivalent to place of, 257, 259.

DONOR —

- declaration of, admissible to show intention when, 354.
- when declaration of, not admissible as against donee, 355.

DURESS —

- may be shown to vitiate written instrument, 143.

DYING DECLARATIONS —

homicide :

- where the death of deceased is a subject of the charge, 297.
- allowed only in case of, 297.
- allowed only to material matters, 298.
- allowed only where declarant is *in extremis* and has given up all hope of life, 297.
- if in writing, must be produced or accounted for, 299.
- must be complete, 299.
- weight to be given to, 299.

E.

ENTICING AWAY —

- declarations of wife competent in actions for, 13.

ENTRIES —

- in church record, evidence of the fact stated when, 277, 286.
- in public documents, evidence when, 282.
- in public records, evidence of itself, 290.
- of death, in family Bible, etc., 283, 290.
- of family history, in public records, 287.
- of marriage, in register, 290.
- of public matters, when evidence, 289.

EQUITABLE ESTOPPEL —

- by bailee, in action by bailor, 509.
- by insurance company, in action by insured, 510.
- by maker of commercial paper, in action by holder, 511.
- by tenant, in action by landlord, 510.
- by whom it may be invoked, 509, 513.

ERASURES —

- presumption that they were made before execution of the instrument, 421, 435.

The references are to pages.

ESTOPPEL —

- as presumptions, 416.
- bona fide* purchasers of commercial paper entitled to protection when, 511, 513.
- by and against corporations, 243.
- preliminary proof in insurance not conclusive, 510.
- what is, 509.

EVIDENCE GIVEN IN A FORMER PROCEEDING —

- must be between the same parties, 314.
- must be in a contested matter, 313.
- what must be shown in order to make it competent, 314.

EXAMINED COPIES —

- when primary evidence, 124.

EXCEPTION IN STATUTE —

- burden of proof of, is upon party alleging it, 212.

EXCISE LAW —

- any person may testify that in his judgment another person was intoxicated, 215, 217.
- any witness may testify that liquor was brandy, gin or whisky, 215.

EXCLAMATIONS —

- as tending to show motive, 330, 334.
- intention, 348, 351.
- of person suffering from bodily or mental feelings, competent evidence when, 330, 333.
- of a woman ravished, 331.
- place where made, material, 322.
- time when made, material, 333.

EXCUSE —

- witness may state his, for not doing certain things, 13.

EXECUTORS AND ADMINISTRATORS —

- acts and declarations of, when competent against estate, 247.
- admissions as to past transactions not within personal knowledge, not competent, 113.
- title of, how proved, 247.

EXEMPLIFICATION —

- copies equivalent to, 124.

EXPERTS —

- a party may testify as to mental injuries received by himself, 394.
- cannot draw inferences from evidence of other witnesses, 395, 398.
- cannot state as to the safety of a rule, 382, 385.
- that a certain place was too narrow to allow a wagon to turn around, 384.
- that a certain fence is sufficient to hold stock, 385.
- that a person has mental strength to manage his business, 386, 389.
- that a person had not testamentary capacity, 387.
- that a place was reasonably safe, 385.

*The references are to pages.***EXPERTS (continued) —**

- cannot state that a place was dangerous, 383.
- that timbers used were improper for the purpose, 382, 385.
- whether a person was generally careful and skilful, 391, 393.
- whether or not a train stopped long enough to permit a passenger to alight, 380, 383.
- in cases of value there are no fixed rules as to, 474
- judge must decide whether, is or not, 359, 366.
- may give opinion from facts claimed to have been proven, 364, 367.
- may state that a caboose was in a bad condition, 382, 385.
 - that all that was possible was done to prevent collision, 383, 385.
 - that a machine was properly handled, 408.
 - that a photograph is a correct representation of a place, 409.
 - that a turn-table is dangerous, 408.
 - that machinery is adapted to the purposes for which it is used, 408.
 - that plaintiff was capable of performing the work satisfactorily, 380, 384.
 - that a vessel was properly loaded, 358.
 - that there was a defect in the sidewalk, 359.
 - the distance in which a car could be stopped, 379, 381.
 - the usual and ordinary capacity of a man for doing business, 395, 399.
 - the necessary measures which should be taken to prevent accidents, 383.
 - their reasons, with their opinions, 384.
 - whether a railroad is properly constructed, 335.
- who are, 378.
- who are deemed, 379.

EXPLAINING —

- inconsistencies between testimony and pleading, 42.

EXTRINSIC EVIDENCE —

- in relation to wills, 252.

F.**FAILURE OF CONSIDERATION —**

- defense to an action upon an instrument when, 179, 181.

FALSE IMPRISONMENT —

- proof of malice is incompetent in actions for, 506.

FALSE REPRESENTATIONS —

- burden of proof upon creditor to show, when, 228.
- constructive burden of proof lies with whom, 234.
- continuous acts of, part of the *res gestæ* when, 225.
- evidence of other transactions to establish, 226.
- may be shown to do away with written instrument, 143, 146, 208.
- must be specially alleged in pleadings, 30.
- never presumed, 434.

The references are to pages.

FALSE REPRESENTATIONS (continued) —

- person presumed to act honestly, 435.
- person charged with, entitled to the presumption of innocence, 225.
- sufficiency of proof of, to carry case to jury, 224.
- will not be implied from relationship of parties, 234.

FAMILY —

- charts or genealogical tables evidence of the fact stated in, 287.
- declarations of relatives as to, 288.
 - of deceased relatives as to, 288.
 - of living persons as to, 290.
- entries in public records as to, 290.
 - Bible of, 287.
- hearsay to prove who are, 289.

FAMILY HISTORY —

- by whose declarations proved, 287, 291.
- declarations of deceased persons as to, 288.
- declarations of living persons competent to show, 290.
- entries in Bible as proof of, 287.
- entries in chart or genealogical table, when proof of, 288.
- facts that may be proved in regard to, 289, 291.
- may be shown by hearsay evidence, 289.
- memorandum in almanac or prayer-book, evidence of, 287, 291.
- registry of births and marriages, part of, 290.

FEELINGS —

- a person may testify that another exhibited mental anguish, 404, 407.
- a witness may testify that the statements of a party were made voluntarily, 390, 394.
- a witness may testify whether or not parties were friendly, 391.

FOREIGN LAW —

- courts will not take judicial notice of, 455, 457.
- new or statutory laws are not presumed to be the same as that of the forum, 456.
- presumed to be the same as that of the forum, 454.
- proved to exist, is presumed to continue, 438, 440.

FORMER ADJUDICATION —

- between strangers, 507.
- defenses to, 508.
- judgments in criminal cases not evidence in civil, 509.
- must be pleaded when, 506.
- parol evidence to show, 508.
- surrogate's decree as, 508.
- what are conclusive between parties, 509.

FORMS OF EXPRESSION —

- experts may state the meaning of, 407.
- may be explained by parol, 156.

The references are to pages.

FRAUD —

- burden of proof upon creditor to show, when, 228.
- constructive, burden of proof lies with whom, 234.
- continuous acts of, 225.
- evidence of other transactions to establish, 226.
- may be shown to do away with written instrument, 143, 203.
- must be specially alleged in pleadings, 30.
- never presumed, 434.
- person presumed to act honestly, 434.
- persons charged with, entitled to the presumption of innocence, 225, 435.
- similar acts committed about the same time are admissible when, 14.
- sufficiency of proof of, to carry case to jury, 224.
- will not be implied from relationship of parties, 234.

FRAUDULENT DESTRUCTION OF INSTRUMENT —

- effect of, upon party, 127, 436, 437.
- party refusing to produce, presumed to have, 437.

G.

GEOGRAPHICAL MATTERS —

- courts take judicial notice of, 97, 98.

GIFT —

- declarations of donor not competent against donee when, 333, 339.
- when competent to show intention, 338.
- inter vivos*, what necessary to, 239.
- of debt, may be made by giving receipt, 239.
- promissory note will pass by delivery of, without indorsement, 239.
- proof of, from husband to wife, must be clear, 263.
- when declaration of donor sufficient, 239.
- when may be shown by parol, 275, 290.

GOOD FAITH —

- purchaser of commercial paper protected when, 511, 513.

GRANTOR —

- declarations of, incompetent as against grantee, 334.
- when incompetent as a witness in an action by his grantee against the estate of a decedent, 79.

H.

HANDWRITING —

- an expert may illustrate upon a blackboard the difference between, 400, 404.
- may state the meaning of characters, marks, figures, etc., 407.
- may state whether a certain paper is dated January or July, 407.
- may state whether a figure is "4" or "2," 157.
- may state whether a note has been altered from "8" to "80," 156, 157.

The references are to pages.

HANDWRITING (continued) —

when a witness testifies to the genuineness of a signature on a paper he may be asked as to the same party's signature to other papers, 402, 404.

when a witness is deemed to be acquainted with, 399, 404.

HEARSAY —

as to facts of family history, 288.

by whose declarations proved, 285.

declarations of deceased person, 288.

of servant and intimate acquaintances, 289.

made in view of controversy, 289.

when declarant alive, 290.

family records, 287.

marriage, 290.

old documents and inscriptions, 288.

ante litem motam, 280.

declarations *post litem motam*, 281.

definition of, 2.

evidence admissible when, 279, 291.

lis mota, what is, 280.

maps and documents, when competent as, 282.

matters of public and general interest, 278.

particular facts not competent, 282.

public and general interest, distinction between, 278.

public interest, what is, 277.

public records, 290.

public facts and statutes, etc., 291.

rights must be ancient and declarant dead, 279.

witness need not specify from whom he heard, 281.

what matters not admissible as, 381.

what is, 275.

HEIRS —

cannot testify to a personal transaction with a decedent when, 80.

exclusion of an interested party, 248.

pleadings in actions by or against, 40.

proof necessary to charge with debt of ancestor, 250.

HISTORY —

family:

by whose declarations proved, 285.

declarations of a deceased person as to, 288.

of relatives, 289.

made in view of controversy, incompetent, 289.

declarations when declarant alive, 290.

facts that may be proved, 288.

hearsay as to facts of, competent when, 275, 290.

marriage, 286.

old documents and inscriptions, 288.

records, 290.

The references are to pages.

HUSBAND—

- contract by, for services of wife, void, 265.
- torts committed by wife in presence of, 265.
- what must be shown in actions for necessities purchased by wife, 265.
- what must be shown in actions for alienation of wife's affections, 264, 266.

HUSBAND AND WIFE—

- agency of husband for wife not presumed, 262.
 - wife for husband, in domestic affairs, presumed, 263
- cannot testify against each other in criminal actions except as to personal injuries inflicted upon themselves, 61, 62, 63, 74, 75.
- communications in presence of a third person not privileged, 61, 62.
- confidential communications between, 61, 63.
- exception to rule of exclusion in criminal cases, 76.
- it is a personal privilege which may be waived, 61.
- letters written by, to the other, privileged, 62.
- marriage; proof of, necessary to entitle it to protection, 62.
- neither is competent either to prove or disprove non-intercourse or non-access, 265, 436.
- presumption of ownership of property and joint possession of, 263, 265, 418.
- proof of gift from one to the other must be clear, 263.
- when relation begins and terminates, 75, 76.
- wife as a witness for co-defendant tried with her husband in a criminal action, 75.
- wife has burden of proof of showing title to property found in possession of herself and husband, 264.

HYPOTHETICAL QUESTIONS—

- form of, within the discretion of the judge, 371, 375.
- must be based upon all the facts or assumed facts to which the opinion is required, 372, 374.
 - upon facts which the jury are to pass upon, 373.
 - upon facts which there is evidence to prove, 376.
- on cross-examination, abstract or theoretical questions may be put, 377.
- opinions of experts must be elicited by, 375.

I.

IDENTITY—

- of name, raises presumption of person, 447.
- of person or thing, how proved, 471.
- of subject or person in written contract may be shown by parol, 150.
- witness may state that a person is commonly known by a certain name, 407.
 - that a photograph is a correct representation of a place, 404, 405.
 - that drawers worn by a party are similar to those stolen from him, 406.
 - that footprints corresponded with defendant's boots, 405, 407.
 - that hair found was from a certain horse, 406.

The references are to pages.

IDIOTS —

incompetent as witnesses, 71.
who are, 71.

IGNORANCE —

of law, no excuse when, 415.

ILLEGALITY —

burden of proof of, upon party alleging it, 232.
must be specially alleged in pleadings, 30.
parol evidence may be given to vitiate written instrument, 143.

ILLEGITIMACY —

may be proved by hearsay when, 283, 290.
will be presumed when, 436.

IMPEACHMENT —

laying foundation for contradicting witness, 21.
number of witnesses upon, 17.
of witness, 15, 16, 17.
sustaining evidence, 18.

IMPLIED ADMISSIONS —

by partial payment, 113.
declaration of one party made in the presence of another, 105.
silence as, 105, 106.
what are, 105, 106.
when it must be shown that party heard the declarations, 106.

IMPRESSION —

of witness, not evidence, 390, 392.

INCIDENT —

adding to contract by usage, 172.

INDORSEMENT —

presumption as to time of, 511, 513.

INFAMY —

how disability removed, 73.
persons convicted of felony, 72, 73.
when renders a witness incompetent, 72, 73.

INFANCY —

may be shown by hearsay evidence, 283, 290.
must be specially alleged in pleadings, 29.

INFANTS —

between the age of seven and fourteen years, not presumed to be capable of committing crime, 450.
knowledge of the nature of an oath necessary, 69, 70.
under seven years, presumed not capable of committing crime, 450.
when competent witnesses, 69.

INITIALS —

witness may state that certain, stand for certain words, 407.

The references are to pages.

INJURY —

- a party may testify that a person looked as though he had been struck with a red-hot iron, 404, 407.
- a plaintiff may testify that he suffered pain in consequence of, 395, 399.
- an expert may testify as to position of party's body at time of receiving, 397, 399.
 - may state the amount of force requisite to cause the, 395.
 - may state the effect of, upon a person, 394, 397.
 - may state whether it could have resulted from the accident complained of, 398.
 - may state whether it is of a class that are painful, 396.
 - may state whether miscarriage is traceable to the, 395, 398.
 - may state whether the injury would have resulted from the cause alleged, 396.

INNOCENCE —

- a person is supposed to do what he has the right and power to do, 451.
- presumption of, continues through the trial in criminal cases, 460, 470.
 - in civil cases, 225, 434.
 - in criminal cases, 460.

INQUIRY —

- as to absence for seven years, necessary when, 443, 447.
- as to character and reputation on cross-examination, 17.

INSANITY —

- an expert may state his opinion as to, based on his own knowledge, 396.
 - may state whether there is any form of, where the mind at fits comes and goes, 387.
 - may testify directly what is, or what causes it, 388.
- communications to defendant may be shown upon the question of, 503.
- once proved to exist is presumed to continue, 441.

INSCRIPTION —

- ancient, evidence of facts stated when, 288.
- on monuments, may be shown by parol, 205.
- on tombstones, may be shown by parol, 205.
- on trees by surveyors, may be shown by parol, 205.
- on walls, may be shown by parol, 205.

INSTRUMENT —

- original need not be produced when in the hands of the opposite party, 128.
 - when beyond the jurisdiction of the court, 128.
 - when cannot be found after diligent search, 127, 129.
 - when in the hands of a stranger who refuses to produce it, 128.
 - when it has been destroyed, 127, 129.
 - when it is a public document, 128.
- ancient, prove themselves when, 282, 290.
- alteration presumed to have been made before execution, 456.
- may be shown to have been delivered conditionally, 201.

The references are to pages.

INSTRUMENT (continued) —

- parol evidence as to identity, existence or validity of, 175.
 - concerning written, 174, 207.
 - to complete an entire agreement of which a writing is only a part, 182.
 - to show circumstances surrounding its execution, 177, 179.
 - to show it was not intended as a contract, 176.
- subsequent changes of, can be shown by parol, 192.
- when consideration mentioned in, may be shown to be different, 179.
- when written, may be contradicted, 208.
- when not signed by both parties, 174.

INSURANCE —

- opinions may be given to show the meaning of certain words in policies of, 407.
- parol evidence may be given to show who were intended to be the true parties in policies of, 194, 195.

INTENT —

- a party may testify that he had never parted with a deed to pass the property, 390.
- a party may testify that he did not intend to charge plaintiff with commission of a crime, 391.
- fictitious consideration fraudulently made up as evidence of, 228.
- is presumed from acts of person, 451.
- may be shown by testimony of witness when, 12.
- of parties to a written instrument, cannot be shown by parol, 153.
- of testator, must be gathered from the will, 159.
- similar fraudulent acts committed about the same time are admissible to show, 14.
- when party may swear to, 226.
- witness may be asked as to his, 14.
- witnesses may swear to their intent when, 390.

INTEREST —

- a person is presumed to do what it is his interest to do, 451.
- matters of public and general, 277, 282.
- of husband and wife, 418.
- what matters involve public or general, 276, 281.
- public and general, distinction between, 278.
- when hearsay admissible, 276, 280.

INTERESTED THIRD PERSON —

- when incompetent as a witness in an action against estate of a deceased person, 79, 248.

INTERLINEATION —

- experts may testify as to whether, was made at the time or after the writing was made, 403, 404.
- party offering paper with, must explain it, 457.
- presumed to have been made before execution of instrument, 456.

The references are to pages.

INTERPRETATION —

- of abbreviations, 407.
- of ambiguous expressions, 158, 160.
- of documents, evidence for, 171, 172.
- of forms of expression, 157.
- of illegible characters, 156.
- of technical expressions, 156.
- of words by usage, 158, 162.
- an expert may testify to the meaning of certain words and characters, 407.

INTOXICATION —

- how proved, 215, 217, 404, 407.
- person in state of, incompetent as a witness, 79.

ISSUE —

- as against one of two or more defendants, 11.
- discharge from debts cannot be shown unless within the, 28.
- evidence must be within, 8.
- evidence must tend to prove, 10.
- failure to deny fact in answer, effect of, 25.
- limitations cannot be proved unless within the, 27.
- of marriage, presumed when, 261.
- of marriage, must be proved how, 261.
- res adjudicata* cannot be shown unless within the, 27.
- title in a stranger cannot be shown unless within the, 25.
- writings collateral to, need not be produced or accounted for, 129.

J.

JOINT LIABILITY —

- proof of, 269.

JUDGE —

- cannot be made to disclose consultations, 49.

JUDGMENT —

- is conclusive proof of the fact stated in it, when, 506.
- in criminal case not evidence in civil case, 501.
- parol evidence may be given to identify parties to, 151.
 - to show illegality of, 143.
 - to show that court had no jurisdiction, 507, 510.

JUDICIAL NOTICE —

- charters, 90.
- common experience, 89.
- courts may take, of photographs, 140.
- law of nations, 91.
- matters of which courts will take, 91, 92.
- matters of which the court will not take, 96.
- official character, duties, acts, etc., 96.

The references are to pages.

JUDICIAL NOTICE (continued)—

- of what matters courts will take, 87.
- political divisions and geographical matters, 97.
- private statutes, 90.
- public acts, what are, 88.
- railroads, 101, 102.
- statutes as ground of action or defense, 100.
- statutes of other states, 99.

JUDICIAL RECORDS —

- parol evidence inadmissible to explain or vary, 206.
- may be given to identify the parties to, 207,
- may be given to show that court had no jurisdiction, 507.

JURISDICTION —

- limited, courts of, not presumed, 421.
- presumption of, of courts, 420.
- secondary evidence of instruments shown to be beyond the court's, may be given, 128.

JURY —

- sufficiency of evidence to go to, 214, 224.
- sufficiency of proof of fraud to carry case to, 224.

JUSTIFICATION —

- person charged with homicide may justify how, 462, 472.

K.

KNOWLEDGE —

- may be presumed from continued ownership, 15.
- may be presumed from the happening of a prior accident at the same place, 14.

L.

LANDLORD AND TENANT —

- contract not to be performed in one year must be in writing, 190.

LANGUAGE —

- a witness may testify as to the meaning of technical words, 407.
- as to what certain letters stand for, 407.
- as to what certain words indicate, 407.
- as to what they understood it to mean, 391.

LAPSING —

- of legacy, how proved, 257.

LAW OF NATIONS —

- courts take judicial notice of, 91.

The references are to pages.

LEADING QUESTIONS —

- as to previous statements in writing, 494.
- allowed upon cross-examination, 493.
- not allowed as to new matter, 494.
- not allowed in examination in chief when, 492.

LEASE —

- written :
 - when parol evidence is competent to show the real parties to, 194.
 - to defeat, 195.

LEGACY —

- ademption of, how proved, 257.
- lapsing of, how proved, 257

LEGATEE —

- incompetency of as a witness in an action against the estate, 80.
- proof necessary to charge, with debt of ancestor, 250.

LEGITIMACY —

- a child born during a mother's coverture is presumed legitimate, 261.
- may be proved by hearsay when, 283, 291.
- presumption of, 261, 436.

LETTERS —

- family, evidence of pedigree, 284.
- proved to have been posted, presumed to have reached the party addressed, 456.

LIBEL —

- repetition of, before action brought, competent, 490, 491.
- after action brought, incompetent, 491.
- witness may state effect produced upon him by a letter, 13.

LICENSE —

- must be alleged when, 21, 41.
- when party charged with selling liquor without, burden of proof on defendant to show, 231.

LIFE —

- hearsay evidence of, competent when, 283, 287.
- is presumed to continue until the contrary is proved, 442.

LIKENESS —

- non-expert may state whether a bust is a good, of a person, 405.

LIMB —

- exhibition of to jury, 139.

LIMITATION —

- exceptions to the general rule of the statute of, may be shown to avoid, 218.
- must be pleaded when, 21, 41.
- when pleaded, plaintiff must show any suspension of time of, 217.

The references are to pages.

LIQUORS —

- burden of proof of sale is upon party alleging it, 215, 217.
- courts take judicial notice of the intoxicating quality of, 93.
- ordinary witness may testify directly that liquor was gin, brandy or whisky, 215.

LIS MOTA —

- what is, 280.

LOCAL USAGE —

- existence of must be clearly shown to have been known to the parties, 268, 271.

LOSS —

- of instrument, must be shown, 130.

LOST INSTRUMENT —

- may be shown by parol, 134.

LUNACY —

- an expert may testify what is, and what causes, 386, 389.
- attesting witness may state his opinion as to, of testator, 387.
- declarations of testator previous to making will competent, 354, 355.
- hypothetical questions as to, may include any portion of the actual history of the case, 388.
- may be shown to vitiate a written instrument, 143.
- non-experts may characterize words and acts as showing, 386.

LUNATIC —

- lucid intervals of, 71, 72.
- not competent as witness when, 71.
- when party cannot testify to a personal transaction with, 77, 78.

M.

MALICE —

- the law presumes, when, 505.

MAPS, CHARTS, ETC. —

- ancient only allowed as evidence of themselves, 294.
- are admissible as declaratory of public matters recited in them, 282.
- when attached to a deed, evidence of itself, 294.

MARKET VALUE —

- is a matter of opinion to be proved by person acquainted therewith, 474.
- expert opinions of, 474.
- mode of proof of, 476, 495.
- offer made for property no evidence of, 481.
- of work, labor and services, how proved, 487.
- price paid on sales, evidence of, 483.
- proof of, in action on special contract, 488.
- proof where there is no, 487.
- sales or value of other property not generally allowed, 483.

The references are to pages.

MARKET VALUE (continued) —

- sum inserted in paper no evidence of, of property sold, 486.
- to give the, of land, the witness need not have been engaged in buying and selling, 475.
- who may testify to, 475, 481.
- witnesses must show that they knew the actual, 478.

MARRIAGE —

- burden of proof is on him who asserts, 260.
- certificate of, sufficient when, 260.
- cohabitation and repute is primary evidence of, 260.
- declarations of either party evidence of, 261.
- presumption of, from living together, 436.
- proof of a contract *per verba de futuro* not sufficient proof of, 260.
- proof of, by hearsay, competent, 286.
- proof of, necessary, 62.
- unconditional agreement of, in the present, sufficient, 260.

MARRIED WOMAN —

- agency for husband in domestic affairs presumed, 262, 266.
- agency of husband for, not presumed, 263.
- contract of husband to pay for services is void, 265.
- must show title to property found in possession of herself and husband, 263, 265.
- pleadings in actions by or against, 39.
- proof of gift from, to husband, must be clear, 264.
- torts of, committed in presence of husband, 265.
- what must be shown in action for necessities purchased by, 265.

MASTER AND SERVANT —

- burden of proof of negligence in actions between, 221.
- servant may state that he was not acting in the course of his employment, 13.

MATTERS PENDING SUIT —

- when competent, 11.

MEMORANDA —

- entries by public officer from reports of other officers, 302.
- evidence given in a former proceeding, 312.
- of a witness, becomes evidence when, 313.
- refreshing memory by, 308.
- when evidence of itself, 311.
- when witness need not have recollection independent of, 311.

MENTAL FEELINGS —

- a person may testify that another exhibited, 405.
- a witness may testify that the statements of a party were made voluntarily, 391, 393.
- a witness may testify whether or not parties were friendly, 391.

The references are to pages.

MISNOMER —

identity of, raises presumption of person, 448.
when may be shown by hearsay evidence, 283, 290.
witness may state that a party is commonly known by a certain, 405, 406.

MISREPRESENTATIONS —

burden of proof upon creditor to show, when, 228.
constructive, burden of proof lies with whom, 234.
continuous acts of, part of the *res gestæ*, 225.
evidence of other transactions to establish, 226.
may be shown to do away with written instrument, 143, 208.
must be specially alleged in pleadings, 30.
never presumed, 434.
person charged with, entitled to the presumption of innocence, 225.
person presumed to act honestly, 435.
sufficiency of proof to carry case to jury, 214.
will not be implied from relationship of parties, 234, 235.

MISTAKE —

of fact, may be shown to vitiate written instrument, 143, 230.

MODIFICATION —

competent to show by parol that written instrument has been modified, 192.

MONEY —

pleadings in actions for, had and received, 37.

MONUMENTS —

ancient; inscriptions on, evidence when, 288.

MORTALITY TABLES —

expert witnesses may testify from, 361, 407.

MOTIVE —

absence of, presumption of innocence, 466.
a party may testify directly whether he intended to do a wrongful act or not, 391.
a party may testify what induced him to do a certain thing, 390, 394.
other crimes may be proved to show, 501.

N.

NAME —

identity of, raises presumption of person, 448.
when may be shown by hearsay evidence, 283, 290.
witness may state that a party is commonly known by a certain, 406.

NEGATIVE EVIDENCE —

is proper when, 11, 383, 385.
what is, 11.

The references are to pages.

NEGLIGENCE —

- acts of, committed abroad, 222.
- contributory, must be proved by whom, 220.
- happening of prior accident at same place is evidence of, 8.
- implied admissions of, 222.
- in actions between master and servant, 221.
- in actions by passenger in sleeping-car, 222.
- in actions for, employee may state that he was not acting in the course of his employment, 13.
- must be proved by whom, 218.
- must be set up in pleadings, 29.
- presumption of, 220.
- as to carriers, bailees, etc., 422.

NEGOTIABLE PAPER —

- bona fide* purchaser of, protected when, 511, 513.
- pleadings in actions upon, 33.
- presumed to have been regularly negotiated, 431.
- presumed to have been transferred at date, 432.
- presumed that the holder is a *bona fide* holder for value, 432.
- simulation and illegality must be alleged and proved, 433.
- when shown to have been procured by fraud, etc., plaintiff has burden of showing himself to be a *bona fide* purchaser, 511, 513.

NEGOTIATIONS —

- when presumed to be merged in written contract, 144, 147.

NEWSPAPERS —

- articles in, not hearsay when, 7.

NEXT OF KIN —

- hearsay evidence as to, competent, 283, 287.
- proof necessary to charge, with debt of ancestor, 250.

NON-ACCESS —

- neither husband nor wife is competent to prove or disprove, 261.

NON-DELIVERY —

- by carrier, presumption of negligence, 426.

NON-EXPERTS —

- a party may testify that he suffered pain, 399.
- cannot state that he thought a person's mind was gone, 387.
- may characterize acts and declarations to which he testifies, 386.
- may give his opinion based upon personal knowledge, 387.
- may state as to the health of another, 399.
- as to the hearing of another, 358, 407.
- as to the eyesight of another, 359, 402.
- that a person was drunk, 405.
- that a person was a vicious and dangerous man, 474, 493.
- that persons were trying to fight, 363, 367.
- that they saw no indications of insanity in a person, 386, 388.
- that stains seen by him were from blood, 365, 370.

The references are to pages.

NON-EXPERTS (continued)—

- may state the amount of damage done by trespass of cattle, 474, 483.
- whether a party appeared to be mad or in fun, 409.
- whether a bed appeared as if any one had been recently sleeping in it, 404, 407.
- whether he took possession of certain property, 392.
- whether or not a bust is a good likeness of a person, 409.
- who is present at the execution of a will, may give his opinion as to the mental capacity of the testator, 388.

NON-NEGOTIABLE PAPER —

- is not protected even in the hands of a good-faith purchaser, 511, 513

NOTARIAL CERTIFICATE —

- courts take judicial notice of the genuineness of, 92.

NOTICE —

- effect of, 133.
- may be presumed from length of time, 14.
- of local usage, must be shown, 168.
- proof of the happening of a prior accident in the same place is evidence of, 14.
- to produce document, necessary when, 131.
- to produce, sufficiency of, 133.

O.

OATH —

- all witnesses must testify under, 67, 68.
- must be according to the peculiar ceremonies of witness' belief, 68.

OBJECTION —

- answer irresponsible in part, remedy of opposite party, 499.
- direction to disregard, 500.
- one to same class of evidence, sufficient, 499.
- question by co-defendant, 399.
- should state the ground when, 498.
- to testimony, 496.
- when general, sufficient, 498.
- when motion to strike out comes too late, 500.
- when to be made, 497.

OFFER —

- not proper after question embracing same matter has been ruled out, 500.

OFFICERS —

- entries made by, competent evidence when, 277, 283.
- entries made by public, from reports of other, 302.

The references are to pages.

OFFICIAL ACTS—

- courts take judicial notice of, 96.
- hearsay of, competent when, 275, 279.
- presumptions of authority, 428.
- proof of official capacity, 428, 429.

OPINIONS—

- allowed only when facts cannot be adequately placed before the jury, 358, 400.
- are competent only when witness is shown to have special knowledge, 359, 367.
- are competent only when no better evidence is available, 368, 375.
- as to the proximate cause of an injury, incompetent, 394, 400.
- as to the pecuniary responsibility of another, incompetent, 361, 407.
- cannot be given as to the object of a transaction, 390.
- cannot be given as to the value of a contract to plaintiff, 474, 483.
- may be given of precise question which the jury is to determine, 359, 367.
- must be based upon evidence in the case when, 364, 376.
- of an abstract question, is incompetent, 372, 384.
- must rest upon reasons rather than descriptive facts, 359, 401.
- prospective profits may be shown by, 475, 481.
- statements of witness ascertained by hearsay are not, 371, 398.
- that a result may follow an injury, 395, 401.
- witnesses skilled in science and art may give, 378.

OPINIONS AS TO LEGAL QUESTIONS—

- a witness cannot testify that a person exercised acts of ownership over property, 393.
 - that certain persons are joint owners of land, 393.
 - that he performed his part of the contract in full, 394.
 - that he took possession of property in his individual capacity, 393.
- a witness may testify that a party went into possession and control of land, 393.
 - that he is the owner of personal property, 393, 394.
 - that he never delivered possession of property, 393.
 - that he never purchased any goods from the seller, 393, 402.
 - that services were not performed under the contract, 393.

ORAL—

- agreement constituting a condition precedent, 201, 203.
- agreement not inconsistent with writing may be proved, 202.
- contemporaneous contract presumed to be merged in written, 203, 205.
- evidence to complete an entire agreement of which a writing is only a part, 182, 190.
- subsequent agreement to rescind or modify written, allowed, 192.

OWNERSHIP—

- declaration as to, admissible when, 352.
- hearsay of, admissible when, 177, 180.
- must be specially alleged in pleadings, 30.
- once shown is presumed to continue, 438, 440.

The references are to pages.

P.

PARENT AND CHILD —

- earnings of a minor presumed to belong to father, 440.
- hearsay of relationship competent when, 283, 290.

PAROL EVIDENCE CONCERNING WRITINGS —

- admissible when, 148, 164.
- not admissible when, 142, 146.
 - conditions precedent, 144, 147.
 - fraud, 143.
 - illegality, 143.
 - intimidation, 143.
 - matters not inconsistent with, 144, 146.
 - want of due execution, 143.
- contemporaneous contract presumed to be merged in written, 144
- to complete an entire agreement of which a writing is only a part, 182.
- usage or custom may be annexed to written instrument by, 172.
- usury may be proved to vitiate a written instrument, 233.
- writing apparently absolute may be shown not to be, 190.

PAROL EVIDENCE TO COMPLETE AN ENTIRE AGREEMENT OF WHICH A WRITING IS ONLY A PART —

- parol warranty by the assignor of a chattel mortgage, 206.
- to show an assignment absolute in terms was intended as security, 192, 193.
- writing must appear to be an entire contract, 182, 187.

PARTIES —

- calling witness, may show his contradictory statements, 19.
- mode of proving reputation other than character, 22.
- parol evidence may be given to show who are, in written instrument, 194.
- when reputation of, is in issue, 22.

PARTNERS —

- admissions of, after dissolution of partnership, not binding, 112, 273, 274.
- admissions by partial payment, 113.
- are each other's agents for the purpose of making admissions, 112.
- executing sealed instrument in name of firm, 272, 273.
- liability of incoming, for outstanding debts, 271.
- power of, after dissolution of firm, 273, 274.
- proof necessary to charge one as partner, 273.
- what acts of, bind firm, 272.
- when dormant, is liable to parties dealing with firm, 273.

PARTNERSHIP —

- agency of partners ceases with dissolution, 273.
- dissolution, effect of, 274.
- dormant partner, when liable to parties dealing with firm, 272.

The references are to pages.

PARTNERSHIP (continued) —

- joint possession, evidence of, 269.
- once shown is presumed to continue, 440.
- proof of, 270.

PASS-BOOK —

- may be used to refresh memory, 308, 310.

PASSENGER —

- money of, lost in sleeping-car, 222.

PAYMENT —

- by check, good when, 236.
- crediting on open account, effect of, 235, 237.
- giving promissory note by creditor to debtor, presumption of, 236, 451.
- great lapse of time, presumption of, 237, 452.
- must be specially alleged in pleadings, 29.
- part, accepted in full, may be proved as a bar, 235, 237.
- part, to take case out of statute of limitations, 218.
- possession of negotiable instrument by maker, presumption of, 451.
- of collateral security, presumption of, 236.
- to sheriff, good when, 235, 237.

PEDIGREE —

- by whose declarations may be proved, 283, 290.
- may be proved by declarations of a deceased person, 288.
 - by declarations of relatives, 289.
 - by declarations of living persons, 290.
 - by old documents and inscriptions, 283.
 - by family records when, 287.
 - by public records, 290.
- may be shown by hearsay when, 287, 290.
- what facts of, may be proved by hearsay, 275, 291.

PENALTY —

- the condition upon which it attaches must be affirmatively shown, 216, 217.

PERAMBULATION —

- consists of what, 295.
- declarations of party making, part of *res gestæ* when, 295.

PERFORMANCE —

- must be specially alleged in pleadings, 30.

PERSONAL TRANSACTION —

- what is, between a witness and a person deceased, 78, 79, 84, 85.
- what is not, between a witness and a person deceased, 84, 85.

PHOTOGRAPH —

- copies made by, primary evidence, 140, 141.
- courts may notice judicially, 141.
- is admissible in evidence when, 140, 141.

The references are to pages.

PHYSICAL CONDITION —

- a party may testify as to the permanent character of his injuries, 394, 399.
- an expert may state as to the cause of death, 396, 398.
 - as to the probable duration of a known injury, 397.
 - as to what may be the result of the disease, 398.
 - that an accident caused, 394, 399.
 - that injuries are of a permanent character, 397, 399.
 - the probability of a party recovering from, 395, 398.
 - whether a miscarriage is traceable to, 395.
 - whether cause which is alleged would be sufficient to produce, 396, 398.
- experts may state as to the, of a person in regard to health and strength, 394, 399.

PHYSICIAN —

- cannot give his opinion that a party is shamming, 391.
- he may state as to the effect of an injury and as to the probable duration of the injurious effects, 394, 399.
 - as to whether the autopsy was properly made, 398.
 - as to whether an abscess was caused by a bruise or fracture, 396.
 - as to whether a person was able of begetting a child, 395.
- prohibited from testifying when, 57.
- statement of party injured to, when competent, 330, 332.
- waiver of protection by patient, 56.
- waiver of protection by party in probate proceedings, 56.

PLEADING —

- a statute, necessary when, 26.
- custom must be alleged in, 25.
- composition must be specially alleged in, 29.
- eviction must be specially alleged in, 32.
- fraud must be specially alleged in, 31.
- illegality must be specially alleged in, 30.
- infancy must be specially alleged in, 29.
- ownership must be specially alleged in, 30.
- payment must be specially alleged in, 29.
- performance must be specially alleged in, 30.
- warranty of title must be specially alleged in, 30.
- discharge from debts must be set up in, 28.
- explaining inconsistencies between testimony and, 42.
- failure to deny in, effect of, 25.
- in actions against receivers, 33.
 - by or against heirs and next of kin, 40.
 - by or against married women, 39.
 - by or against public officers, 39.
 - on judgments, 32.
 - for money had and received, 37.
 - upon negotiable paper, 32.
 - for work and materials, 33.

The references are to pages.

PLEADING (continued) —

- matter of inducement need not be alleged in, 28.
- negligence must be set up in, 29.
- promise to pay note after dishonor need not be alleged in, 26.
- release must be alleged in, 28.
- res adjudicata* must be set up in, 27.
- special damages must be alleged in, 29.
- statute of limitation must be specially set up in, 27.
- title in a stranger must be alleged in, 25.
- trespass, how alleged in, 29.

POLITICAL DIVISIONS —

- courts take judicial notice of, 97, 98.
- hearsay evidence of, competent when, 277, 282.

POSSESSION —

- ancient, may be proved by a deed or will without proof of execution thereof, 292, 296.
- declarations accompanying, competent when, 293.
- declarations of deceased surveyor, when competent to show, 296.
- hearsay evidence of, competent when, 277, 282.
- lawful origin presumed from, 459.
- legal title presumed from, 460.
- maps, when evidence of, 294.
- modern exercise of right not essential to, 295.
- once shown is presumed to continue, 488.
- owner's declarations, when against interest, evidence of, 296.
- perambulations may be shown in aid of, 295.
- witness may testify that a certain person was in, 393.
 - that a defendant went into, 393.
 - that he is in, of real property, 393.
 - that he never delivered, 392.

POST LITEM MOTAM —

- declarations made, incompetent, 281.

PRACTICE —

- accomplice's corroboration, when necessary, 505.
- admissions of party in place of writing, 123.
- answer irresponsive in part, remedy of opposite party, 499.
- attesting witness must be called when, 136.
- damages, mode of proof of, 474, 482.
- direction to disregard evidence, 500.
- examination as to statements in writing, 494.
- general objection, sufficient when, 498.
- insanity, when communications to party incompetent, 503.
- judgments of foreign courts, how proved, 126.
- judicial proceedings of state courts, how proved, 125.
- leading questions not allowed in examination in chief, 492.
 - allowed in cross-examination, 493.
 - not allowed as to new matter drawn out by party, 494.

The references are to pages.

PRACTICE (continued) —

- legislative acts, how proved, 125.
- malice, how proved, 505.
- notice of local usage must be shown, 168.
- notice, sufficiency of, 133.
- notice to produce document necessary when, 131.
- objection must assign the particular grounds when, 498.
- objection, when to be made, 500.
- one objection to the same class of evidence sufficient, 499.
- original documents must be produced when, 120, 124.
- parol evidence cannot be used to prove a contract that the statute of frauds requires to be in writing, 190, 191.
- proof of other crimes to show motive, proper when, 501.
- public documents, how proved, 123, 127.
- questions by a co-defendant, 499.
- records of the nation, how proved, 126.
- re-examination, how far limited, 494.
- secondary evidence admissible when, 127.
 - how proved, 134.
 - sufficiency of, 135.
- sufficiency of search for lost instrument, 130.
- threats by deceased competent, 504.
- threats by defendant competent, 504.
- usage must be proved by the multiplication or aggregation of a number of instances, 164.
- when document is required by law to be registered, 136.
- when document produced upon demand of opposite party, 132.
- when the document is not directly in issue, 129.
- when motion to strike out comes too late, 500.
- when writing need not be produced or accounted for, 129.
- where papers are made at different times, 496.
- where the document is acknowledged, 122.
- whole examination, limit of, 496.
- whole writing may be introduced, 495.

PRELIMINARY —

- evidence necessary to show conspiracy, 348, 351.
- evidence to show partnership, 270, 273.

PREPONDERANCE OF EVIDENCE —

- alibi* must be established by, 462.
- sufficient, 214.

PRESUMPTION —

- against crime, 422.
- against spoliation, 436.
- agreement to pay for services, when, 430.
- a party presumed to know the contents of a writing signed by him, 418.
- a party must show a fact of which he is best cognizant, 410.

The references are to pages.

PRESUMPTION (continued) —

- as to carriers, bailees, etc., 422.
 - negligence of, 422.
- as to property, 426.
 - by carriers as to passengers, 421.
 - by railroad trains, 427.
 - by tugs, ships, etc., 427.
 - contributory negligence, 425.
 - in an accident case, 422.
- as to absentees, 443.
- as to alteration, suppression, destruction or manufacturing of evidence, 437.
- as to alteration of instruments, 456.
- as to authority of agent, 458.
- as to character and habits of persons, 441.
- as to correctness of dates, 434.
- as to delivery of document, 458.
- as to document regular on its face, 434.
- as to domicile, 440.
- as to infancy, 440.
- as to legal title from possession, 460.
- as to legitimacy, 436.
- as to marriage, 436.
- as to negotiable paper, 431, 434.
- as to partnership, 440.
- as to receipt of letters, 458.
- as to residence, 440.
- as to sanity, 441.
- as to solvency, 440.
- as to statutes of foreign states, 456.
- as to the common law, 454, 455.
- circumstances and, difference between, 412.
- circumstances inflexible proof, when, 413.
- concerning person's *status*, 417.
- conclusive, what are, 412.
- definition, 410.
- every one is presumed to know the law, 415.
- estoppels as, 416.
- from affectation of grief, 470.
- from attempts to stifle investigation, 469.
- from concealment, 469.
- from disguise, 469.
- from fabrication of evidence, 470.
- from flight, 469.
- from silence when charged with crime, 470.
- from spoliation of evidence, 470.
- from recent possession of the fruits of crime, 467.
- from unexplained suspicious appearances, 468.

The references are to pages.

PRESUMPTION (continued) —

- implied admissions, 222.
- interest of husband and wife, 418.
- juris et de jure*, 412.
- lawful origin from possession, 460.
- limited jurisdiction, court of, 421.
- no arbitrary rule fixed, 413.
- no, of agency of husband for wife, 263.
- not retrospective, 442.
- official acts, of authority, 428.
- of absence of motive, 460.
- of *alibi*, 462.
- of agency of wife for husband in domestic affairs, 263.
- of cause of death, 464.
- of continuance of things, 438.
- of *corpus delicti*, 463.
- of death, 442.
- of death and time of death from voyage and special peril, 444, 445.
 - and time of death from seven years' absence, 443.
 - after seven years, 444.
 - before seven years, 446.
- of good character of party accused, 461.
- of guilt, 462, 465.
- of identity, 447.
- of identity of person or thing, 447.
- of infanticide, 464.
- of innocence in civil actions, 225.
- of intent, 448.
- of intent, when the doing of an act does not raise, 450.
- of jurisdiction of court, 420.
- of life, 442.
- of marriage from living together, 260.
- of motive, 466.
- of negligence, 220.
- of ownership of property and joint possession of husband and wife, 263, 264.
- of payment, 451.
 - from giving promissory note by creditor to debtor, 236, 452.
 - from great lapse of time, 237, 451, 452.
 - from possession of negotiable instrument by maker, 452.
 - of collateral security, 236.
- of survivorship, 447.
 - of persons who perished in the same accident, 446.
- of the course of nature, 450.
 - where age, health or sex may raise, 447.
- proof of official capacity, 428.
- regularity of proceedings, 420.
- that a person does what he has the right and power to do, 450.

The references are to pages.

PRESUMPTION (continued) —

- that a person does what it is his interest to do, 451.
- that a person acts honestly, 434.
- that a public officer has done his duty, 266, 268, 417.
- that the foreign laws are the same as that of the forum, 454.
- that the usual course of business was followed, 429.

PRIMARY EVIDENCE —

- admissions of party in place of writing, 123.
- counterparts, 120, 122.
- lithographic copies, 121.
- parol is, when, 174, 182.
- photographic copies, 121, 123.
- rules for proving, 120, 123.
- what instruments must be produced, 122.
- what is, 119, 125.

PRINCIPAL AND AGENT —

- death of one ends relationship, 326, 353.
- of husband for wife, 263, 266.
- of wife for husband, 262, 265.
- relationship, how proved, 326, 349.

PRINCIPAL AND SURETY —

- declaration of one evidence against the other, when, 110.
- relationship between, how proved, 110, 111.

PRIVILEGE —

- of witnesses, 43.
 - questions calling for criminating answers proper, 44.
 - questions tending to degrade a witness not allowable, when, 48.
- clergymen, 59.
- client, 49.
- counsel, 49.
- grand jurors, 60.
- patients, 55.
- physicians, 55.
- state officials, 60.
- state secrets, 60.
- waiver by patients, 53.

PRIVILEGED COMMUNICATIONS —

- between counsel and client, 49.
- between husband and wife, 61.
- between physicians and patients, 55.
- between state officials, 60.
- extent of protection, 50.
- offer to settle or compromise, 64.
- protection perpetual when, 53.
- what are not, 53.

The references are to pages.

PRIVITY —

must be shown to make the declarations of one competent against another, 109, 112.

PRODUCTION —

of instrument, necessary when, 122, 127.

PROPERTY —

contract for sale of, when must be in writing, 192.

PUBLIC ACTS —

and general, distinction between, 278.

courts will take judicial notice of, 89.

declarations made after controversy originated are excluded, 281.

declarations must have been made before controversy arose, 280.

hearsay evidence admissible when, 275, 290.

rights must be ancient and declarant dead, 279, 282.

witness need not specify from whom he heard, 281, 290.

what are, 88.

what matters involve, 275, 290.

PUBLIC DOCUMENTS —

copies equivalent to exemplifications, 124, 130.

certified copies, 124, 132.

examined copies, 124, 133.

exemplifications, 124, 131.

foreign acts of state, judgments, etc., 126, 138.

general records of the nation, 126, 137.

legislative acts of states and territories, 125, 136.

recitals in, are evidence in any action in which they are relevant, 291.

records and judicial proceedings of state courts, etc., 125, 131.

records of state not judicial, 126, 137.

PUBLIC OFFICERS —

acts of, may be proved by hearsay, 277, 289.

courts take judicial notice of, 92.

entries by, from reports of other, 302, 306.

are presumed to have done their duty, 266, 270, 417.

pleadings in actions by or against, 39.

protected by process, 266, 268.

return of process offered by, 267.

when strict proof of title is necessary, 268.

when strict proof of title is not necessary, 267, 270.

PURCHASERS —

who are good faith, 511, 513.

Q.

QUALITY —

expert evidence as to, 474, 478.

QUANTITY —

a party may testify that he did a full man's work, 379, 385.

The references are to pages.

QUANTUM MERUIT —

what may be shown under allegation of, 34, 35.

QUESTION —

form of:

as to character, in criminal cases, 16.

in civil cases, 17.

tending to degradé a witness, 48.

R.

RAILROAD COMPANIES —

courts take judicial notice of the customs of, 101, 102.

presumption as to negligence of, 422, 428.

RATIFICATION —

of acts of agents, proof of authority, 326, 349.

REAL PROPERTY —

contract for sale of, cannot be shown by parol when, 190, 191.

REASON —

a person may testify as to his, for doing an act, 390, 394.

a witness may state his, 13, 391, 393.

RECEIPT —

when may be varied or contradicted by parol, 181.

RECEIVER —

pleadings in actions by or against, 38.

RECITALS —

of facts in statutes, etc., evidence, 291.

RECORDS —

family, evidence when, 287, 290.

of judicial proceedings of state courts, 125.

of foreign states, 125, 127.

of legislative act, primary evidence, 125.

of state, not judicial, 126.

recitals in public, evidence when, 290.

REFORMATION OF CONTRACT —

when written may be explained by parol, 156, 167.

REFRESHING MEMORY —

by memoranda, 308.

REGULARITY —

of proceedings in courts presumed, 420.

RELATIONSHIP —

declarations of living persons competent to prove, when, 290.

declarations of relatives competent to prove, when, 289.

family records competent to prove, when, 287.

hearsay evidence competent to prove, when, 289, 290.

inscriptions competent to prove, when, 288.

public records competent to prove, when, 290.

The references are to pages.

RELEASE —

burden of proving upon whom, 229, 234.

RELEVANCY —

affectation of grief, 470.

attempts to stifle investigation, 469.

concealment, disguise, flight, etc., 469.

definition of, 3.

evidence must be within the issue, 8.

evidence must tend to prove issue, 10.

evidence of poverty of creditor to disprove loan, 7.

facts that support or are inconsistent with the opinions of experts are, when, 360, 393.

fabrication of evidence, 470.

former statements of witness out of court to corroborate testimony, 7.

grounds of opinion when, 353, 406.

happening of a prior accident at same place, 8.

indecenty of, no objection to, 6.

intentions, good faith, etc., 12.

matters pending suit, 11.

meaning of, 5.

proof of corroborating declarations, 13.

proof of negative, 11.

questions tending to degrade a witness must be answered when, 43.

recent possession of the fruits of crime, 468.

silence when charged with crime, 470.

spoliation of evidence, 470.

threats or expression of ill-will, 467.

unexplained suspicious appearances, 468.

RELIGIOUS BELIEF —

belief in a future state not necessary, 68.

no particular, necessary to render witnesses competent, 67, 68.

REPUTATION —

by declaration of deceased person, 276, 283.

by whose declaration family history may be proved, 285, 287.

form of question as to, in criminal cases, 16.

form of question as to, in civil cases, 17.

in criminal cases, is competent to disprove guilt, 16.

inquiry as to, in cross-examination, 17.

matters of public and general interest may be proved by hearsay, 277, 290.

may be proved by hearsay when, 275, 286.

mode of proving other than as to character, 22.

not competent unless put in issue by defense when, 15.

number of witnesses upon, limited, 17.

of family, may be proved by hearsay, 283, 286.

of marriage, may be proved by hearsay, 286, 287.

of particular facts, cannot be proved by hearsay, 282.

The references are to pages.

REPUTATION (continued) —

- proof of corroborating declarations, 18.
- should be of the place where party resides, 17.
- sustaining evidence of, 18.
- when in issue, 22.

RES ADJUDICATA —

- between strangers, 507.
- defenses, 508.
- how proved, 508.
- judgments in criminal, not evidence in civil cases, 509.
- may be shown when not pleaded, when, 507.
- must be set up in pleadings, 27, 506.
- parol evidence to show, 508.
- surrogate's decrees are, when, 508.
- what adjudications are, 508.

RESCISSION —

- of written contract, may be shown by parol, 192.

RES GESTÆ —

- admissions in one's own favor, when part of the, 117.
 - of agent, when part of the, 109.
 - of administrator or executor, part of the, when, 113, 114.
 - of partner, when part of the, 118.
 - of principal, when part of the, 110.
- continuing circumstances when, 325.
- declarations as to ownership, 335, 345.
 - as to fraudulent conveyances, 339.
 - of agent, when, 326.
 - of representative, when, 326, 328.
 - of assignor against assignee, 329, 343.
 - of assignor for benefit of creditors prior to assignment, 331.
 - of donor, testator or intestate, 354, 355.
 - of grantor subsequent to the execution and delivery of a deed, 334, 340.
 - of seller of chattels after sale, 336, 339.
 - of seller of chattels at time of selling, 338.
- length of time allowed, 322, 354.
- narratives of past occurrences are not, 323, 350.
- place where statements made material when, 327, 354.
- statement of a party injured to his physician, 330, 335.
- statements must be contemporaneous, 334, 354.
- test of determining when a declaration is, 324.
- thing done must be equivocal, 326, 352.
- vendee must be a purchaser for value to exclude declarations of vendor, 339.
- what considerations are held to be, 322, 355.
- what things are embraced within the definition of, 323, 351.

The references are to pages.

RESIDENCE —

hearsay evidence to prove, competent when, 283, 287.
once shown is presumed to continue, 438, 442.

RES INTER ALIOS ACTA —

evidence not competent unless specially pleaded, 22, 30.

REVOCATION —

declarations of testator competent to show will, 354, 355.
of grant, may be proved by hearsay when, 275, 290.

S.

SALE —

of property, must be alleged how, 35, 36.

SCIENCE —

meaning of, in cases of expert evidence, 358, 407.

SCIENTER —

innocence, presumption of in civil actions, 225.
other frauds committed about the same time are evidence of, 226.
plaintiff must prove, when, 228.

SCOPE OF BUSINESS —

admissions of agent, when within, 109.
of principal, when within, 110.
of executor or administrator, when within, 113.
torts committed by agent, when within, 245

SEALED INSTRUMENTS —

rights and obligations of parties to, in action at law, 147.
rights and obligations of parties to, in equity actions, 147.

SEARCH —

sufficiency of, 130.
for lost instrument, 129, 135.

SECONDARY EVIDENCE —

admissible when, 127, 138.
how proved, 134, 137.
sufficiency of, 135, 138.
what is, 120, 138.

SECUNDUM ALLEGATA ET PROBATA —

evidence contradictory of, inadmissible, 9.
in equity cases, 9.
judgment must be, 8.
same rule prevails in criminal cases, 9.
when no objection is made, 9.

SERVICES —

agreement to pay for, presumed when, 430.

SHERIFF —

courts take judicial notice of the acts and signature of, 97.
when declarations of under-sheriff bind, 111.

The references are to pages.

SHIP —

presumptions as to negligence of, 424.

SHOP-BOOKS —

preliminary proof necessary when, 304, 307, 476, 490.

refreshing memory by, 303.

time of entry material when, 305, 310.

when allowed as evidence, 304, 309, 474, 490.

SIGNATURE —

proved by comparison when, 399, 408.

who may testify as to, 400, 407.

SILENCE —

as an implied admission, 10, 106, 107.

of one charged with committing a crime, 106.

receiving an account, 107.

to whom a letter is written, 108.

under arrest, 107.

SLANDER —

defendant may testify that he did not intend to charge the plaintiff with the commission of a crime, 391, 394.

witnesses may give their understanding of alleged, spoken in their presence, 390, 393.

SLEEPING-CAR —

money of passenger lost in, 222.

STATE OFFICIALS —

cannot be compelled to divulge transactions of their departments, 60.

STATE SECRETS —

what are, 60.

witness cannot be compelled to divulge, 60.

STATUTE —

as ground of action or defense, 100.

courts take judicial notice of public, when, 99.

recitals in public, evidence of the facts, 291.

STATUTE OF FRAUDS —

parol admissions of party cannot take the place of a writing, 104, 190, 193.

parol evidence cannot take the place of a writing, 190, 191.

where the memoranda does not contain all the substantial elements of a contract, 174, 194.

STATUTE OF LIMITATIONS —

burden of proof to show, rests upon whom, 217, 218.

exception to, must be proved by whom, 218.

indorsement by payment on instrument must be shown how, 218.

must be specially set up in pleadings, 27.

new promise must be proved by whom, 217.

partial payment by partner, effect of, 113.

part payment must be proved by whom, 218.

suspension of time must be proved by whom, 218.

The references are to pages.

SUBSCRIBING WITNESS —

must be called when, 122, 132.
when, is dead, 121, 131.

SURETY —

admissions of principal binding upon, when, 110.
not binding upon, when, 110.

SURPLUSAGE —

meaning of, 10.
not necessary to prove, 10.

SURVEYORS —

deceased, declarations of, competent when, 296.
declarations of, when making a survey, competent when, 295, 297,
statement of public, evidence when, 277, 284.

SURVIVORSHIP —

presumption of, 446, 450.
persons who perished in the same accident, 446.
where age, health or sex may raise presumption of, 447.

T.

TECHNICAL WORDS —

in instrument, explained by parol, 156, 157.

TELEGRAM —

incompetent evidence when, 134, 138.
message must be shown to have been sent to party, 136, 224.
original dispatch must be produced when, 136.

TELEPHONE COMMUNICATIONS —

when competent evidence, 355, 356.

TENDER —

must be pleaded when, 28.

TESTATOR —

declarations of, competent to show intentions in making will, 354.
when competent against legatees or devisees, 326, 327.

TIME —

an expert may state the length of, necessary to do certain things, 379,
385.
of performance of written contract, cannot be shown by parol, 150, 153.

TITLE —

private, cannot be proved by hearsay when, 295, 300.
public, may be proved by hearsay when, 292, 293.

TOMBSTONES —

inscriptions on, evidence when, 283.

The references are to pages.

TRADITION —

- as to particular facts, inadmissible, 282.
- boundaries proved by, when, 292, 300.
- by whose declarations may be proved, 276, 282.
- cannot be given to show private matters, when, 294.
- declarations made before controversy, 280, 282.
- declarations in view of controversy incompetent, when, 280.
- declarations *post litem motam* incompetent to prove, 281.
- family records as part of, 283, 290.
- maps and documents as evidence of, 282.
- marriage may be proved by, when, 286.
- old documents and inscriptions as part of, 283.
- of facts of family history, 287.
- proof of ancient possession, 292, 297.
- public records a proof of, 290.
- what facts of family history may be proved by, 287, 290.
- when rights are ancient and declarants dead, 279, 290.
- when competent to prove matters of public and general interest, 277, 290.
- witness need not specify from whom he heard, 281.

TRESPASS —

- how alleged in pleadings, 29.

TRUSTEE —

- admissions of, not binding upon his *cestui que trust* when, 109.
- bound by declaration of *cestui que trust* when, 109.

U.

UNDERSTANDING —

- of witness, is admissible, 390, 393.
- witnesses may give their, of alleged slanderous words spoken in their presence, 382, 406.

UNDUE INFLUENCE —

- may be shown by whom, 234.

USAGE —

- adding instrument to contract by, 172.
- how established, 161, 172.
- local, notice of must be shown, 168, 171.
- meaning of words interpreted by, 171.
- must be certain and reasonable, 162, 172.
 - general, 161, 172.
 - notorious, 162, 170.
 - proved by the multiplication or aggregation of great number of instances, 164, 172.
 - uniform, 161, 170.
- must not be inconsistent with a written contract, 162, 172.
- not admissible unless pleaded, 161.

The references are to pages.

USAGE (continued) —

- qualities of, 163, 170.
- what is, 161, 172.
- when not necessarily general, 163, 170.
- when not valid, 166, 172.

USURY —

- defendant must prove contract and intent, 233.
- must be specially alleged, 233.
- the facts must be stated in pleading, 233.

V.

VALUE —

- a witness may give his opinion as to the rental value of property, 474, 479.
- an attorney may testify to the value of his services, 475, 480.
- an expert cannot be asked to what extent property was damaged, 476, 482.

VARIANCE —

- between pleadings and proof, 25, 32.

VENDOR —

- declarations of, against interest of purchaser, inadmissible, 334, 340.
- vendee must be a purchaser for value to exclude declarations of, 339.
- when declaration made at the time of selling property, 338.

W.

WAGES —

- value of, how proved, 487.

WAIVER —

- burden of proof of, is upon the party alleging it, 211, 241.
- of protection of communications between counsel and client, 49, 50, 51.
- of privilege of confidential communications between husband and wife, 63.
- of protection of communications between physician and patients, 58.
- of witness in answering criminating questions, 45, 46.
- of protection to communications between a party and a person deceased, 81, 82.

WIDOW —

- when incompetent as a witness in an action for her husband's land, 80.

WILL —

- construction of, 159, 160.
- conversations as to intention cannot be resorted to, 159.
- declarations of testator competent to show intentions in making, 354.
- extrinsic evidence affecting, 252, 260.
- latent ambiguity in, explained by parol, 158, 162.
- name cannot be inserted in, by parol, 159, 160.

The references are to pages.

WITNESS —

- competency of, 67, 86.
- disease affecting his mind, 66.
- extreme youth, 66.
- interested in the event of the suit, 67.
- not believing in the existence of God, 66, 67.
- religious belief, 67, 68.
- competent to prove motives, 12.
- cross-examination of, as to collateral facts, for the purpose of impeachment, not allowed, 20.
- employee may state that he was not acting in the course of his employment, 13.
- former statement of, out of court, competent to corroborate when, 8.
- laying foundation for contradicting, 21.
- may state effect produced upon him by a letter, 13.
- may state that he did or refrained from doing something on account of information received from third person, 12.
- number as to character limited, 17.
- party calling, may show contradictory statements, 19.
- privilege of, 43.
 - of refusing to answer confidential communications with his wife, 53.
 - of refusing to answer questions tending to criminate, 44.
 - of refusing to answer questions tending to degrade, 48.
 - of refusing to disclose state secrets, 60.
 - of refusing to reveal confidential communications with attorney, 49.

WORDS —

- courts take judicial notice of the customary abbreviation of, 93, 94.
- of the meaning of, 93.

WRITINGS —

- admissions of party in place of, 123.
- ancient, prove themselves when, 282.
- a party presumed to know the contents of, signed by him, 418.
- not signed by both parties, 174.
- parol evidence concerning, 174, 203.
- parol evidence of circumstances surrounding the execution of, 170.
- parol evidence to complete an entire agreement of which there is only a part, 182.
- when consideration mentioned in, may be shown to be different, 179.
- when need not be produced or accounted for, 129.

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